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WILSON'S OHIO CRIMINAL CODE

Annotated with Decisions, Forms and Precedents for Indictments, Informations, and Affidavits, Forms for Writs, Docket and Journal Entries, being both the Criminal Practice and Procedure in the Ohio Courts

TENTH EDITION

BY

FRANK N. PATTERSON

Of the Ashland County Bar. Former Prosecuting Attorney

VOLUME II.

CINCINNATI

THE W. H. ANDERSON COMPANY

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Sec. 13104. Obtaining property or signature by false pretense.

Whoever, by false pretense and with intent to defraud, obtains anything of value or procures the signature of another as maker, indorser or guarantor to a bond, bill, receipt, promissory note, draft, check or other evidence of indebtedness or whoever sells, barters or disposes of a bond, bill, receipt, promissory note, draft, or check or offers so to do, knowing the signature of the maker, indorser or guarantor thereof, to have been obtained by false pretense, if the value of the property or instrument so procured, sold, bartered or disposed of, or offered to be sold, bartered or disposed of, is thirty-five dollars or more, shall be imprisoned in the penitentiary not less than one year nor more than three years, or, if less than that sum, shall be fined not less than ten dollars nor more than one hundred dollars or imprisoned not less than ten days nor more than sixty days, or both. (R. S. § 7076; 70 v. 39, § 1; 73 v. 20, § 2; 74 v. 41, § 12.)

By any false pretense.—A false pretense, within the meaning of the statute, must relate to a past event or an existing fact. Any representation or assurance in relation to a future transaction, is not included. Dillingham v. State, 5 O. S. 280.

Where a contract for the loan of money is induced by the fraud and false pretenses of the borrower, and the lender, in performance of the contract, delivers certain bank bills, without any expectation that the same bills will be returned in payment, the borrower is guilty of obtaining money by false pretenses, but is not guilty of the crime of larceny. Kellogg v. State, 26 O. S. 15.

Evidence having been given tending to show that a watch was sold, warranted to be gold, and that such warranty was false and fraudulent, it is not error to exclude testimony offered to show what the value of the watch was, under an information against the warrantors for obtaining money under false pretenses. Bartlett v. State, 28 O. S. 669.

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On the trial under such an indictment evidence of previous transactions which necessarily involve guilty knowledge by the defendant with reference to the transaction in question is admissible, but as to transactions occurring subsequent to that on which the indictment is based, evidence is not admissible. Coblentz v. State, 84 O. S. 235.

False representations by the defendant that she was collecting money and funds for the relief of certain children is a representation as to an existing fact. Ex parte Fitzpatrick, 21 C. C. 519, 11 O. C. D. 695.

The representation for payment of a check or draft, payable on demand, to one other than the drawee, considered alone, imparts a representation that the drawer had funds to meet it. Semler v. State, 6 C. C. (N.S.) 393, 17 O. C. D. 581.

W procured the signature of S to a promissory note for $200, by representing that he wanted to show the note to one H, to show H that W had a good standing where he lived, had friends who had confidence in him, who would sign and indorse bankable paper for him; that he wanted the note for no other purpose, promising that it would then be left in the possession of W, and he would destroy it. Said representations and promises were false. Held, that there were no false pretenses, as S was deceived not by any statement of facts on the part of W, but by reliance upon a promise not meant to be fulfilled, and a false statement as to intention. Winnet v. State, 18 C. C. 515, 10 O. C. D. 245.

An indictment for false pretenses can not be founded upon an assertion of an existing intention, although it did not in fact exist; there must be a false representation as to an existing fact. Winnett v. State, 18 C. C. 515, 10 O. C. D. 245.

A false pretense, within the meaning of the statute, must relate to a past event or an existing fact. Any representation or assurance in relation to a future transaction is not included. Winnett v. State, 18 C. C. 515, 10 O. C. D. 245.

An affidavit which charges the accused that "she falsely pretended to collect money and funds to provide shoes and clothing for certain destitute children and that she had arranged after such children were provided with suitable clothing to have them admitted to a certain orphan asylum by which false pretenses she did solicit and receive from the affiant twenty-five cents with intent then and there to cheat and defraud affiant of such money, whereas in truth she was not collecting money for said children of which she then and there well knew," charges a representation of a present purpose in the collecting of the money—an existing fact which is properly negatived in the affidavit, and the false pretense so charged does not merely relate to a future event. In re Fitzpatrick, Habeas Corpus, v. McConnell, Sheriff, 21 C. C. 519, 11 O. C. D. 695.

Where A is induced by the fraudulent representations of B to transfer to B the title to certain bank bills, without any expectation that the same bills will be returned in payment, B is guilty of obtaining the money by false pretenses, but is not guilty of larceny since that is not a tortious taking of the property. Kellogg v. State, 26 O. S. 15.

A representation as to the value of land may be a mere opinion or a statement of existing fact, and where it is the latter an indictment for obtaining property by false pretenses may be predicated thereon. Williams v. State, 77 O. S. 468.

Where a representation as to value is one of existing fact or of opinion only is a question of fact to be determined by the jury. Williams v. State, 77 O. S. 468.

Any improbable lie or absurd or irrational statement made to a person of ordinary sagacity or understanding would not be a false pretense. In re False Pretenses, 9 O. D. 825.

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Obtains anything of value.—An averment in an indictment that the prisoner, by false pretenses, obtained money from A B, is not sustained by proof that the prisoner, by false pretenses, procured A B to indorse a forged check, and then sold the check for money, and that A B afterward paid the amount of the check to the purchaser. Baker v. State, 31 O. S. 314.

Where one, by means of false pretenses, induces another to buy from him property, and in payment thereof obtains a check upon funds owned by the drawer in bank, a criminal prosecution may be properly brought under the first clause of R. S. § 7076. Tarbox v. State, 38 O. S. 581.

It is no defense to an indictment for obtaining money by false pretenses that the transaction in which the money was so obtained was unlawful. Horton v. State, 85 O. S. 13.

The title to real estate situated in this state is the subject of false pretenses. State v. Toney, 81 O. S. 130.

In a prosecution for obtaining the signature of a person to a note by false pretenses, it is not necessary that the value of the note be found by the verdict of the jury, the amount of the note, and not its value, being the basis upon which the grade of the offense, and the punishment on conviction are to be determined. Ellars v. State, 25 O. S. 385.

The word "obtain," as used in G. C. § 13104 is not limited to getting, securing or appropriating money or property as owner. It includes as well the getting or securing of money or property by way of a loan. Tingue v. State, 90 O. S. 368.

The crime of obtaining property under false pretenses is made out, if the property obtained unlawfully under the false pretenses is a deed selling and conveying a farm to another, though possession of the farm was never surrendered by the prosecuting witness. Golner v. State, 19 C. C. (N.S.) 571.

That the person from whom money was obtained by false pretenses was engaged in an unlawful business and that the money paid was for the purpose of securing immunity from police prosecution, is no defense to a criminal prosecution for obtaining money by false pretense that the defendant was an officer of the law. Zuckerman v. State, 24 C. C. (N.S.) 404.

For meaning of "anything of value," see G. C. § 12369.

Obtains the signature of any person as maker, etc.—The amount of the note, and not its value, determines the grade of the offense, and the punishment to be inflicted upon conviction; and hence, to procure the signature of a person notoriously insolvent to a promissory note, as the maker, by false pretenses, would complete the offense, although the note might not be of any value. Ellars v. State, 25 O. S. 384.

An indictment contains the averment that an order issued by the county auditor on the county treasurer, in favor of A, was presented to the treasurer by B, and that by reason of B's false pretense that the order was properly issued on a valid claim, and that he (B) was authorized to receive payment, the treasurer paid the order by delivering to B a check. Held, that the alleged facts, coupled with the further averment that by said false pretenses B procured the treasurer's signature to the check, as maker, with intent to defraud, does not constitute the offense of procuring another's signature by false pretenses. Kennedy v. State, 34 O. S. 3[illegible].

An indictment charging that the prisoner by false pretenses, procured A B to indorse a forged check, which was of "no value," and that "upon the indorsement" the prisoner obtained seventy-five dollars, the money of A B, with intent to defraud him "of the same," is not a good indictment for the offense of procur-

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ing a person, by false pretenses, and with intent to defraud, to indorse a check. Baker v. State, 31 O. S. 314.

An intent to defraud is an essential element of the crime of procuring a signature by means of false pretenses. Coblentz v. State, 84 O. S. 235.

Venue.—Where A, by false pretenses, contained in a letter sent by mail, procures the owner of goods to deliver them to a designated common carrier in one county, consigned to the writer in another county, the offense of obtaining goods by false pretense is complete in the former county, and the offense must be prosecuted therein. Norris v. State, 25 O. S. 217.

A party charged by affidavit before a justice of the peace with the crime provided for in this statute, who has fled from the jurisdiction of this state, may be extradited and returned to this jurisdiction, notwithstanding that a formal indictment had not been found against him. In the matter of Strauss, 197 U. S. 324.

The police court of Cincinnati has jurisdiction to try cases of prosecution for obtaining money or goods by false pretenses. Dillingham v. State, 5 O. S. 280; approved, Ex parte Scott, 19 O. S. 581; Bartlett v. State, 28 O. S. 669.

Indictment.—An indictment, to charge the offense of obtaining property by false pretense or pretenses, must clearly state and charge the following essential facts against the accused: 1. The making of some false pretense. 2. The obtaining thereby from another person some item of money, goods, merchandise, or effects. 3. That the same was obtained with the intent to cheat and defraud the person from whom so obtained of the same. Schleisinger v. State, 11 O. S. 669.

The indictment must aver all the material facts of a crime with such reasonable certainty as to advise the accused as to what he may expect to meet on the trial. Dillingham v. State, 5 O. S. 280.

An indictment for obtaining goods by false pretenses is sufficient if it allege that the goods were obtained by the defendant by means of the false pretenses, and with the fraudulent intent particularly stated, without other averment that the owner relied upon and was induced thereby to part with the goods. Norris v. State, 25 O. S. 217.

In the act making it an offense to procure by any false pretense or pretenses, the signature of a person to a promissory note, "as the maker thereof," the words "as the maker" constitute a material part of the description of the offense, and must be averred in the indictment. Ellars v. State, 25 O. S. 385.

An indictment charging that the prisoner, by false pretenses, procured A B to indorse a forged check, which was of "no value," and that "upon the indorsement," the prisoner obtained seventy-five dollars, the money of A B, with intent to defraud him "of the same," is not a good indictment for the offense of procuring a person, by false pretenses, and with intent to defraud, to indorse a check. Baker v. State, 31 O. S. 314.

An indictment contains the averment that an order issued by the county auditor on the county treasurer, in favor of A, was presented to the treasurer by B, and that by reason of B's false pretense that the order was properly issued on a valid claim, and that he (B) was authorized to receive payment, the treasurer paid the order by delivering to B a check. Held, that this is not a sufficient averment under the crimes act that B obtained the check by false pretenses. Kennedy v. State, 34 O. S. 310.

The same rules are applicable to the description of the property in a charge for obtaining goods by false pretenses, as in larceny. The goods should be described with such certainty as will enable the jury to decide whether the chattel proven

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to have been stolen is the very same with that upon which the indictment is founded, and to enable the defendant to plead his acquittal or conviction to a subsequent indictment relating to the same chattel. Where, in an indictment for obtaining goods by false pretenses, the only description of the property is "a certain lot of dry-goods," the description is insufficient. Redmond v. State, 35 O. S. 81.

In an indictment for obtaining goods by false pretenses, the pretenses consisted of representations by the accused of the value of several stocks of goods he owned, of the amount of his indebtedness, and of the amount that he was worth: Held, that negative averments in the indictment, which, in effect, merely deny the representations to be literally true, but which do not negative their substantial truth as a means whereby the accused obtained credit in the purchase of goods, are bad. Redmond v. State, 35 O. S. 81.

The indictment charged the defendant with falsely pretending to Joseph R. Leonard that he, Henry W. Trisler, was the owner of certain real estate in the village of Hamersville, in said County of Brown, and State of Ohio, known as the Kauffman property, and that he was also the owner of thirty-four acres of land adjoining the said real estate in the village of Hamersville, and that he was also the owner of certain real estate in the village of Hamersville, known as the Dr. Love property, and that none of the said real estate was incumbered by debts or liens, and that all said real estate and land was in the name of him, the said Henry W. Trisler, and that he, the said Henry W. Trisler, did not owe anything and was out of debt, * * * whereas, in truth and in fact, the said Henry W. Trisler did owe and was indebted to divers persons to the amount of more than one thousand dollars, and the said Henry W. Trisler was then insolvent, and that the said real estate was incumbered by debts and liens, and that all of said real estate was not in the name of said Henry W. Trisler, and that he was not then and there the owner of all of said real estate. By the Court: A majority of the court is of the opinion that the indictment is faulty in two particulars.

1. The allegations "that said real estate was incumbered by debts and liens, and that all of said real estate was not in the name of said Henry W. Trisler, and that he was not then the owner of all of said real estate," do not amount to substantial denials. For aught that appears, defendant may have been the owner, in his own name, of all save some insignificant parcel of the land, and the liens and debts may have been trifling in amount.

2. The allegation that defendant "did owe and was indebted to divers persons to the amount of more than one thousand dollars" is indefinite. It was the right of the defendant to be informed of the names of the persons to whom the state charged him with being indebted, and, approximately, of the amount to each, in order that he might intelligently prepare his defense. State v. Trisler, 49 O. S. 583.

Revised Statutes § 7076 (G. C. § 13104), which makes it an offense to obtain by any false pretense, and with intent to defraud, anything of value, applies to a charge for obtaining, by false pretense, with intent to defraud, title to real estate situate in this state. State v. Toney, 81 O. S. 130.

An indictment which apprises the party charged of the charge against him so that he may know from the language of the instrument what he is expected to meet and will be required to answer, alleges sufficient matter to indicate the crime and the person charged and is not void for uncertainty. State v. Toney, 81 O. S. 130.

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An indictment under R. S. § 7076 (G. C. § 13104), for procuring a signature to a bond, note, or other evidence of indebtedness, must allege that the signature was secured, not only by false pretense, but with intent to defraud, and must aver all of the material facts necessary to be proven in order to convict, with such reasonable certainty as to advise the defendant what he may expect to meet at the trial. Coblentz v. State, 84 O. S. 235.

An indictment under R. S. § 7076 (G. C. § 13104) for obtaining money by false pretenses must set forth the alleged false pretenses with such certainty and precision as will reasonably apprise the defendant of what he will be required to answer, and so that the court may determine what evidence is admissible and must allege that the pretenses were in fact false and made with intent to defraud. It is no defense to an indictment for obtaining money by false pretenses that the transaction in which the money was so obtained was unlawful. Horton v. State, 85 O. S. 13.

An indictment under G. C. § 13104 for obtaining money or property by false pretense, must allege that the money or property was obtained with intent to defraud, as well as that it was obtained by false pretense. Intention to defraud is made an essential element of such offense by the section referred to. State v. Mutchler, 87 O. S. 268.

Mere matter of unnecessary particularity or immaterial description contained in an indictment is not sufficient upon which to base a charge of variance between pleading and proof. Such variance must be based upon some essential element of the offense or some essential part of such element. Tingue v. State, 90 O. S. 368.

A mistrial should not be ordered in a cause simply because some error has intervened. The error must prejudicially affect the merits of the case and the substantial rights of one or both of the parties, and this is as true of the temporary absence of the judge as any other departure from due process of law during the trial of a cause. Tingue v. State, 90 O. S. 368.

Where an indictment contains three counts, one count charging forgery, another charging the issuing of a false and forged instrument, the third charging the obtaining of money under false pretenses, and the state relies for conviction on the third count in the indictment, charging the obtaining of money under false pretenses, solely upon the fact that the check presented to the bank for payment was a forged instrument, and that the defendant either having forged the same or knowing it to have been forged, presented it for payment, and the jury finds that the defendant is not guilty of forgery and not guilty of issuing a false and forged instrument, it should return a verdict of not guilty of obtaining money under false pretenses. Griffith v. State, 93 O. S. 294.

A separate count charging each crime may be contained in one indictment, but upon the trial of such indictment the court should instruct the jury that the accused can not be found guilty of both crimes in reference to the same money or property. The rule is the same where these crimes are charged in separate indictments, and if it appears from the evidence that the state has theretofore procured conviction for the embezzlement of money, the accused can not be found guilty upon a second indictment of obtaining the same money by false pretenses. Griffith v. State, 93 O. S. 294.

In an indictment for unlawfully offering to sell promissory notes, the signature to which had been procured by false pretenses, it is not necessary to allege that the notes are of any value, where a copy thereof is set forth in the indictment. Umbenhauer v. State, 4 C. C. 378, 2 O. C. D. 606 (affirmed, 23 W. L. B. 176).

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A draft upon a bank, payable upon demand, is undistinguishable from a check, and either a draft or a check, considered alone, imports a representation that the drawer has funds to meet it.

Where the false pretense proved was a different false pretense from the one charged, a judgment of conviction must be reversed, notwithstanding the aggravated nature of the offense committed. Semler v. State, 6 C. C. (N.S.) 393, 17 O. C. D. 581.

An indictment charging false pretenses must specify the pretenses relied on, and allege a sufficient part thereof; the intent to defraud; that the false pretense was relied on; must specify the property obtained and its ownership and value; must give the names of the persons defrauded; connect the pretense with the accomplished fraud; and negative the premises, and allege that the defendants had knowledge of their falsity. State v. Williams, 6 N. P. (N.S.) 406, 18 O. D. 794 (affirmed, 77 O. S. 468).

For description of instruments in an indictment, see G. C. § 13586.

General Code § 13594 provides that an indictment for larceny may contain counts for false pretenses, embezzlement and receiving stolen property.

Evidence.—For material variance, see G. C. § 13582.

General Code § 13691 provides that the jury on conviction shall ascertain and declare in their verdict the value of the property obtained by false pretenses.

In a prosecution for procuring the signature of a person to a promissory note, it is not necessary that the value of the note be found by the verdict to the jury, the amount of the note, and not its value being the basis upon which the grade of the offense and the punishment on conviction are to be determined. Ellars v. State, 25 O. S. 385.

An averment in an indictment that the prisoner by false pretenses obtained money from A B, is not sustained by proof that the prisoner by false pretenses procured A B to indorse a forged check, and then sold the check for money, and that A B afterward paid the amount of the check to the purchaser. Baker v. State, 31 O. S. 314.

If the thing sold is not what it is represented the mere fact that it has some value is not a defense. Bartlett v. State, 28 O. S. 669.

In an indictment for obtaining money under false pretenses, under this section, an averment as to the disposition which was to be made of such money is immaterial; and a variance between the indictment and the evidence is not fatal. Tingue v. State, 90 O. S. 368.

Mere matter of unnecessary particularity or immaterial description contained in an indictment is not sufficient upon which to base a charge of variance between pleading and proof. Such variance must be based upon some essential element of the offense or some essential part of such element. Tingue v. State, 90 O. S. 368.

Where the indictment charged that A falsely represented that he had money on deposit in a bank, and that B was induced thereby to cash a draft for A, and the evidence discloses that the draft was cashed by B on A's assurance that he had "arranged for" its payment, the variance is fatal and a judgment of conviction will be reversed. Semler v. State, 6 C. C. (N.S.) 393, 17 O. C. D. 581.

To constitute the crime of obtaining property by false pretenses it must appear from the evidence that the accused wrongfully and unlawfully obtained possession of the property by means of false pretenses. Griffith v. State, 93 O. S. 294.

It is no defense to an indictment for obtaining money by false pretenses that the transaction in which the money was so obtained was unlawful. Horton v. State, 85 O. S. 13.

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The crime of embezzlement is not made out by evidence which might be sufficient to establish the crimes of larceny or obtaining money under false pretenses. Ottke v. State, 17 C. C. (N.S.) 390.

On the trial of an indictment under this section, evidence of previous transactions which necessarily involve guilty knowledge by the defendant with reference to the transaction in question is admissible, but as to transactions occurring subsequent to that on which the indictment is based, evidence is not admissible. Coblentz v. State, 84 O. S. 235.

Where it becomes material to prove that a conspiracy existed between persons jointly indicted, evidence that the same persons were, shortly prior to the time of the alleged crime, engaged in a conspiracy to commit crimes of a like nature, is competent. Tarbox v. State, 38 O. S. 581.

Conspiracy shortly after the time of the alleged crime to commit crimes of a like nature is competent. Jackson v. State, 38 O. S. 585.

Similar fraudulent representations may be introduced in evidence to show the fraudulent intent of the defendant. State v. Finney, 7 Dec. Rep. 22, 1 Bull. 30.

FORMS OF CHARGES.

Obtaining anything of value.

Unlawfully and knowingly did falsely pretend, with intent to defraud, to one M N, that (set out the false pretenses), by which said false pretenses, the said E F then and there unlawfully did obtain from the said M N (set out the thing of value obtained), of the value of ——— dollars, of the personal property of the said M N with intent then and there to cheat and defraud the said M N out of the same, whereas, in truth and in fact (negative each of the false pretenses); and the said E F at the time he so falsely pretended as aforesaid well knew the said false pretenses to be false; that the said false pretenses were false in fact and induced the said M N to part with his said property.

Procuring signature.

Unlawfully did falsely pretend, with intent to defraud, to one M N, that (set out the false pretenses), by which said false pretenses, the said E F then and there unlawfully did procure the signature of the said M N, as maker (or, indorser, or, guarantor), to a bill (or, bond, or, receipt, or, promissory note, or draft, or, check, or other evidence of indebtedness, naming it) of the value of ——— dollars, which said bill (or, bond, or, receipt, or, promissory note, or, draft, or, check, or other evidence of indebtedness, naming it), was in the words and figures following, to-wit: (set out copy of the bill, bond, receipt, promissory note, draft, check, or other evidence of indebtedness), whereas, in truth and in fact (negative each of the false pretenses), and the said E F, at the time he so falsely pretended as aforesaid, well knew the said false pretenses to be false.

Sec. 13105. False bill, note, bond, etc., for payment out of public treasury prohibited; penalty.

Whoever, knowing it to be false or fraudulent in whole or in part, makes, presents for payment or certifies as correct to the general assembly, either house thereof or a committee thereof, or the auditor

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of state, other state officer or board thereof, or the auditor, commissioners or other officers of a county, or the auditor or other accounting officer of a municipal corporation, or the township trustees or other township officer, a claim, bill, note, bond, account, pay roll or other evidence of indebtedness, for procuring its allowance or an order for the payment thereof out of the treasury of the state, or of such county, township or municipal corporation, or whoever, knowing it to be false and fraudulent in whole or in part, receives payment thereon from the treasurer of the state, or a county, township or municipal corporation, if it is false or fraudulent to the amount of thirty-five dollars or more, shall be imprisoned in the penitentiary not less than one year nor more than ten years, or, if it is fraudulent to a sum less than that amount, shall be fined not more than two hundred dollars or imprisoned not more than thirty days, or both. (R. S. § 7075; 69 v. 193, § 1; 102 v. 115.)

Auditor, commissioners, or other officers of any county.—Where B, a county auditor, fraudulently issued an order on the county treasurer in favor of A, and received payment thereof from the treasurer, on the false pretense that he was authorized by A to do so, while, in fact, as he well knew, A had no claim against the county, and had never presented any such claim, and had never given B authority to issue the order or receive payment, this does not constitute an offense under this section. Kennedy v. State, 34 O. S. 310.

General Code § 2997 providing that an allowance to the sheriff for the expense of maintaining horses and vehicles shall be made, does not authorize the purchase of horses and vehicles at the county's expense. State, ex rel., v. Commissioners, 10 C. C. (N.S.) 398.

Accounting officer of any municipal corporation.—An accounting officer is such an officer as may lawfully pass upon and allow a claim or account against a municipal corporation, upon the authority of which allowance the auditor (comptroller) may issue his warrant upon the treasurer. Hauck v. State, 45 O. S. 443.

The board of infirmary directors of a municipal corporation is an accounting officer in the sense in which that term is employed in R. S. § 7075. Hauck v. State, 45 O. S. 439.

Indictment.—An indictment under R. S. § 7075 (G. C. § 13105), charging the defendant with having unlawfully, knowingly and feloniously made out and presented for payment, and certified as correct to the auditor of a municipal corporation, a false and fraudulent pay-roll against said corporation for the purpose of procuring an allowance of the same by said auditor and said corporation, and for the purpose of procuring an order for payment of the same out of the treasury of such corporation, with intent to defraud, sufficiently charges an offense under said section, and a motion to quash the indictment because it does not show authority in the auditor to allow or pay the pay-roll should be overruled. State v. Voute, 68 O. S. 274.

A criminal charge should be preferred with such certainty and precision as will reasonably apprise the party charged of that which he may expect to meet and be required to answer, and so that the court and jury may know what they are

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to try and the court may determine without unreasonable difficulty what evidence is admissible; also that the record to be made will be sufficiently definite to make it clear of what the party has been put in jeopardy. Du Brul v. State, 80 O. S. 52 (overruling Davis v. State, 20 O. C. C. 430, and 10 O. C. D. 738).

An indictment brought under R. S. § 7075, charging the presentation to the county commissioners of a false and fraudulent claim and obtaining payment of the same by the county treasurer, which in describing the claim avers it to have been "a certain false and fraudulent claim," but in no way avers wherein it was false and fraudulent, and states no facts showing that it was false or fraudulent, is bad on demurrer and will not support a conviction. Du Brul v. State, 80 O. S. 52.

An indictment under R. S. § 7075 (G. C. § 13105), charging the presentation to a county auditor of a false and fraudulent expense bill for the purpose of procuring a warrant for the payment of the same out of the treasury of the county, which, in describing the bill, avers it to have been a false and fraudulent bill and sets out the bill itself showing items of expense incurred as sheriff of the county, and then alleges that certain particular items pointed out were not incurred by defendant, and that the bill was presented with intent to defraud, he knowing it to be false, sufficiently charges an offense under above section. (Du Brul v. State, 80 Ohio St. 52, approved and followed.) State v. Van Gunten, 84 O. S. 177.

Where the indictment charges city employes with conspiring with members of a firm to defraud the city, evidence of the transactions other than the one upon which the indictment is based is admissible to prove that the parties were in a conspiracy, and for the purpose of showing guilty knowledge as to the false claim upon which the indictment is based. Davis v. State, 20 C. C. 430, 10 O. C. D. 738 (affirmed, 63 O. S. 183).

The verdict in a conviction under this section must state the amount to which the bills are found to be fraudulent. Spafford v. State, 10 C. C. (N.S.) 185, 20 O. C. D. 33.

FORM OF CHARGE.

Presenting false claim to city auditor.

Unlawfully and falsely pretending that the city of ——— was indebted to him, the said E F, in the sum of ——— dollars, for (state what the claim was for), unlawfully did make out a certain false and fraudulent bill against the city of ———, which false and fraudulent bill was in the words and figures following, to-wit: (set out the bill); which said claim was fraudulent in this, to-wit: (here set out in what respect the claim is fraudulent), and unlawfully did present said false and fraudulent bill to C D, then and there the auditor of said city of ———, for the purpose of procuring the allowance of said bill by the said C D, and for the purpose of procuring from the said C D an order for the payment of said bill, out of the treasury of said city of ———, with intent to defraud, he, the said E F, then and there well knowing said bill and claim to be false and fraudulent.

Sec. 13105-1. False statements; penalty.

Whoever knowingly makes or causes to be made, either directly or indirectly, or through any agency whatsoever, any false statement in

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writing, with intent that it shall be relied upon, or, knowing that a false statement in writing has been made by another with such intent, respecting the financial condition, property indebtedness, means, or ability to pay, of himself or any other person, firm or corporation, in whom or which he is interested or for whom or which he is acting, and upon the faith thereof he or some other person acting for or in collusion with him or with his knowledge, procures in any form whatsoever, either the delivery of personal property, or chose in action, the payment of money, the making of a loan or credit, the extension of a credit, the discount of an account receivable, or the making, acceptance, discount or endorsement of a bill of exchange, promissory note or other commercial paper, either for the benefit of himself, or such person, firm or corporation, shall, if the value of the thing or amount of the loan, credit or benefit procured is thirty-five dollars or more, be deemed guilty of a felony, and be fined not more than one thousand dollars or imprisoned in the Ohio penitentiary not more than six years or both, or if the value be less than that sum, be deemed guilty of a misdemeanor, and be fined not more than one hundred dollars or imprisoned in the county jail or workhouse not more than six months, or both. (101 v. 227.)

Sec. 13106. Selling by false weights.

Whoever, in buying or selling any property, or directing or permitting an employee so to do, makes or gives a false or short weight or measure; or whoever has charge of scales or steelyards fixed for the purpose of misweighing an article bought or sold, or, having scales or steelyards for the purpose of weighing property, reports a false or untrue weight; or whoever uses in the sale of a commodity a computing scale or device indicating the weight and price of such commodity upon which scale or device the graduations or indications are false, or inaccurately placed, either as to weight or price, shall be fined not more than fifty dollars. (R. S. § 7067; 66 v. 27, § 1; 99 v. 132; 103 v. 499.)

The police court of a municipal corporation may take judicial notice of its ordinances, but the common pleas and circuit court may not do so. Municipal corporations are not vested with power to make it an offense "to expose for sale turnips in a receptacle not tested, marked and sealed by the city sealer," and a conviction by a police court on such a charge will be set aside. Gates v. Cleveland, 18 C. C. (N.S.) 349 (reversing 11 N. P. (N.S.) 545, 21 O. D. 141).

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FORMS OF CHARGES.

Selling by short weight or measure.

Did knowingly, wilfully, and fraudulently sell to one M N nine bushels and no more (or other measure or weight, naming it), of a certain article and commodity, to-wit, flax-seed (or other article, either solid or liquid, whether sold by measure or weight), as and for the quantity of ten bushels thereof (or other measure or weight, naming it); and the said E F did then and there and thereby in so doing unlawfully, knowingly, and wilfully make and give a false and short measure (or, weight) of said article in said sale thereof, whereby the said M N was defrauded and injured.

Weighman making false report of weight.

Having then and there in his charge certain scales (or, steelyards), for the purpose of weighing live stock, hay, grain, and coal (or other specific articles, naming them), and other articles; then and there, by the procurement of one C D, did weigh and cause to be weighed, and pretend to weigh and cause to be weighed, a certain load of hay, then and there the property of the said C D. And the said E F did then and there report to one M N, and divers other persons, that the weight of said load of hay was two thousand and five hundred pounds, whereas in truth and in fact the weight thereof was not more than two thousand and four hundred pounds, which he, the said E F, then and there well knew; and the said M N being deceived by said report, on the day and year aforesaid, purchased of said C D the said load of hay, as of and for the weight so reported; and so the said E F did then and there, in the manner and time aforesaid, unlawfully, knowingly, and wilfully report a false and untrue weight of said hay, whereby the said M N was in manner aforesaid injured and defrauded.

Sec. 13107. Selling stone-coal by unlawful weights or measures.

Whoever sells and delivers stone-coal except at legal weights and measures, shall be fined not less than five dollars nor more than fifty dollars or imprisoned not less than five days nor more than thirty days. (R. S. § 7070; 72 v. 15, § 3.)

Sec. 13108. Measure for small fruits.

Whoever, in selling berries or other small fruits, uses a measure other than the standard dry measure half-bushel or an aliquot part thereof; shall be fined not less than ten dollars nor more than fifty dollars. (R. S. § 4242-1; 91 v. 134; 103 v. 64.)

Municipal corporations are not vested with power to make it an offense "to expose for sale turnips in a receptacle not tested, marked and sealed by the city sealer," and a conviction by a police court on such a charge will be set aside. Gates v. Cleveland, 18 O. C. (N.S.) 349.

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Sec. 13109. Miller, grain dealer, etc., must use standard half-bushel.

Whoever being a commission merchant, miller, dealer, grain inspector, corporation, firm, association or person, or an officer, agent or employe thereof purchasing or receiving wheat in barter or exchange for flour, or otherwise, from the original producer, his agent or employe, for testing or determining the weight, grade, milling or market value thereof, uses a measure other than the standard half-bushel or uses a measure that is a fractional part of such standard half-bushel, furnished this state by the United States, shall be fined not less than twenty-five dollars nor more than one hundred dollars or imprisoned in jail not more than thirty days, or both. Fines collected under this section shall be paid into the county treasury to the credit of the county fund. (91 v. 47, §§ 1, 2; R. S. § 4439-1, 2.)

While the legislature has full power to reguire the use of standard measures, it has no power to protect one class of persons to the exclusion of other classes, unless there is some basis in reason for the distinction between the classes. This section protects the producers of wheat to the exclusion of all other dealers in wheat and is unconstitutional. Yeazill v. State, 20 C. C. 646, 10 O. C. D. 794.

Sec. 13110. Taking illegal toll at mill.

Whoever, being the owner or occupier of a mill, or his representative, agent or miller, takes a greater proportionate quantity of toll than is allowed by law, shall be fined not more than twenty dollars and be liable to the party injured in damages. (R. S. § 7068; 29 v. 449, § 3; S. & C. 859.)

Sec. 13111. Selling articles having forged stamp, brand or label affixed.

Whoever sells or keeps for sale goods, merchandise, a mixture or preparation, upon which a forged or counterfeit stamp, brand, imprint, wrapper, label or trade-mark is placed or affixed, intended to represent such goods, merchandise, mixture or preparation as the true and genuine goods, merchandise, mixture or preparation of another, knowing it to be counterfeit, shall be fined not more than one hundred dollars. (R. S. § 7069; 56 v. 86, § 3; S. & C. 455.)

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Sec. 13112. Manufacture or sale of goods improperly marked "sterling" or "sterling silver."

Whoever makes, sells or offers to sell or dispose of, or has in his possession with intent to sell or dispose of, an article of merchandise marked, stamped or branded with the words "sterling" or "sterling silver", or incased or inclosed in a box, package, cover, wrapper or other thing having thereon an engraving or printed label, stamp, imprint, mark or trade-mark, indicating or denoting that such article is silver, sterling silver or solid silver, unless nine hundred and twenty-five one-thousandths parts of the metal of which such article is manufactured is pure silver, shall be fined not more than one hundred dollars. (92 v. 54, § 1; R. S. 7069-1.)

Sec. 13113. Manufacture or sale of goods improperly marked "coin" or "coin silver."

Whoever makes, sells or offers to sell or dispose of, or has in his possession with intent to sell or dispose of, an article of merchandise marked, stamped or branded with the word "coin" or "coin silver", or encased or inclosed in a box, package, cover or wrapper or other thing, having thereon an engraving or printed label, stamp, imprint, mark or trade-mark, indicating or denoting that such article is coin or coin silver, unless nine hundred one-thousandths parts of the metal of which such article is manufactured is pure silver, shall be fined not more than one hundred dollars. (92 v. 55, § 2; R. S. 7069-2.)

Sec. 13114. Unlawful sale of certain kinds of wool.

Whoever sells wool, washed on a sheep's back or otherwise, containing unwashed tag-locks, unwashed wool, black-wool, parts of buck's fleeces, or other substance foreign to the fleece or fleeces which is calculated and intended to defraud the purchaser thereof, shall be fined not less than twenty-five dollars nor more than one hundred dollars or imprisoned not less than thirty days nor more than ninety days, or both. (85 v. 285, §§ 1, 2; R. S. 7069-3, 4.)

An indictment charging fraud in the sale of wool under § 7069-3 (G. C. 13114), must allege that unwashed wool was sold as washed wool and that the fleeces were wrapped in a manner calculated to defraud, and there must be definite and certain statements as to substances alleged to have been concealed in the fleeces. Hogue v. State, 3 C. C. N. S. 315; 13 O. C. D. 567.

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Sec. 13115. False or fictitious bills of lading on water craft, etc.

Whoever, with intent to defraud, executes and delivers a false or fictitious bill of lading, receipt, schedule, invoice or other written instrument to the purport or effect that property usually transported by carriers had been or was held, delivered, received or deposited on board of a steamboat or watercraft navigating the waters in or bordering upon this state, or at the freight office, depot, station or other place designated or used by a railroad company or other common carrier for the reception of such property, when such property was not held or had not been delivered, received or deposited on board such steamboat or other watercraft, or at such place, at the time such written instrument was made and delivered, or indorses, assigns, transfers or puts off such false or fictitious bill of lading, receipt, invoice, schedule or other written instrument or attempts so to do, knowing it to be such, shall be imprisoned in the penitentiary not less than one year nor more than four years. (R. S. § 7085; 50 v. 132, § 1; 57 v. 56, § 1; S. & C. 422.)

FORMS OF CHARGES.

Executing and delivering a false receipt of merchandise and another passing it off.

Did unlawfully, fraudulently, and knowingly execute and deliver, and cause to be executed and delivered to one C D, a certain false and fictitious receipt and schedule, to the purport and effect that certain goods, wares, and merchandise, of the value of ——— dollars, to-wit: (here describe them as described in the schedule, had then been received, by the said E F, of and from the said C D, on board of the steamboat ———, then navigating the Ohio river, one of the waters bordering on the State of Ohio, when such goods, wares, and merchandise, had not, nor any part thereof, been received as aforesaid, by the said E F, on board of said steamboat, nor by any other person on board said steamboat, from the said C D, nor from any other person, and the said receipt and schedule was then and there made, executed, and delivered, according to the aforesaid purport and effect of said receipt and schedule, with intent to injure, deceive, and defraud some persons to the jurors aforesaid unknown; and the said C D, afterward, to-wit, on the ——— day of ———, in the year aforesaid, in the county of ——— aforesaid, unlawfully, fraudulently, and knowingly, did attempt to indorse, assign, transfer, and put off, and then and there did unlawfully and fraudulently indorse, assign, transfer, and put off to one M N, the false and fictitious receipt and schedule aforesaid, with intent to injure, deceive, and defraud the said M N, he, the said C D, then and there well knowing said receipt and schedule to be false and fictitious.

Executing and delivering a false receipt purporting that merchandise had been received by a railroad company.

Did unlawfully, fraudulently, and knowingly execute and deliver, and cause to be executed and delivered to one C D, a certain false and fictitious receipt and instrument of writing, to the purport and effect that the ——— railroad company, a body corporate (which said body corporate the said E F then and

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there represented, and then and there pretended to represent, as, and in the capacity of [set out the agency, clerkship, or office in which the defendant was acting]), had then and there, to-wit, at ———, in the county aforesaid, received of C D, certain goods, wares, and merchandise of the value of ——— dollars, to-wit: (describe them as they are described in the false instrument, and give the further purport of the instrument as to the place of the receipt or storage, according to the fact), into the possession, custody, and control of the said body corporate, when such goods, wares, and merchandise had not then been received by the said body corporate, in good faith, according to the aforesaid purport and effect of said receipt and written instrument; with intent in so doing to defraud, deceive, and injure one M N.

Sec. 13116. False bill of lading on canal boats.

Whoever knowingly signs or delivers to a collector of tolls of the canals of this state a false bill of lading for merchandise or freight upon a boat or other float navigating such canals, shall be fined not less than three times the value of any property omitted from or falsely invoiced in such bill. (38 v. 103, § 82; R. S. 218-147.)

Sec. 13117. Issuing or endorsing false warehouse receipt.

Whoever, with intent to defraud, executes and delivers a false or fictitious warehouse receipt, acknowledgment, or other instrument of writing, to the purport and effect that a person held or had received in store, or held or had received in a warehouse, or in another place, or held or had received into possession, custody, or control, goods, wares, or merchandise, when such goods, wares, or merchandise were not held, or had not been received, in good faith, by such person; or, whoever indorses, assigns, transfers, or delivers or attempts to indorse, transfer, or deliver to a person, such false or fictitious warehouse receipt, acknowledgment, or instrument of writing, knowing it to be such, shall be imprisoned in the penitentiary not less than one year nor more than three years. (R. S. § 7086; 50 v. 132, § 2; S. & C. 423.)

FORM OF CHARGE.

Executing a false warehouse receipt, and another transferring the same.

At the township of ———, in said ———, did unlawfully, fraudulently, and knowingly execute and deliver, and cause and procure to be executed and delivered to one E F, a certain false and fictitious warehouse receipt, to the purport and effect that the said C D had then received of the said E F, into the warehouse of him, the said C D, there situate, certain goods, wares, and merchandise, of the value of ——— dollars, to-wit: (describe them as they are described in the receipt), when such goods, wares, and merchandise had not then and there been received in good faith, according to the aforesaid purport and effect of said warehouse receipt; with intent in so doing to defraud, deceive, and injure one M N; and

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the said E F, afterward, to-wit, on the ——— day of ———, in the year of our Lord one thousand nine hundred and ———, at ———, in the county of ——— aforesaid, unlawfully and fraudulently, did indorse, assign, transfer, and deliver the said warehouse receipt to the said M N, with intent him, the said M N, to defraud; he, the said E F, then and there well knowing said warehouse receipt to be false and fictitious.

Sec. 13118. Warehouseman issuing receipt for goods not received.

Whoever, being a warehouseman, his officer, agent or servant, issues or aids in issuing a receipt knowing that the goods for which such receipt is issued have not been received by such warehouseman or are not under his actual control at the time of issuing such receipt, shall be fined not more than five thousand dollars or imprisoned in the penitentiary not more than five years, or both, for each offense. (99 v. 410, § 50.)

Sec. 13119. Issuing receipt containing false statement.

Whoever, being a warehouseman, his officer, agent or servant, fraudulently issues or aids in fraudulently issuing a receipt for goods, knowing that it contains a false statement, shall be fined not more than one thousand dollars or imprisoned in the penitentiary not more than one year, or both, for each offense. (99 v. 410, § 51.)

Sec. 13120. Duplicate receipt to be so marked.

Whoever, being a warehouseman, his officer, agent or servant, issues or aids in issuing a duplicate or additional negotiable receipt for goods knowing that a former negotiable receipt for such goods or a part thereof is outstanding and uncancelled, without distinctly placing on the face thereof the word "duplicate", except in the case of a lost or destroyed receipt after proceedings are had as provided by law, shall be fined not more than five thousand dollars or imprisoned in the penitentiary not more than five years, or both, for each offense. (99 v. 410, § 52.)

Sec. 13121. Negotiable receipt must state ownership.

Whoever, being a warehouseman knowing he is the owner, solely, jointly or in common with others, of goods deposited with or held by him, his officer, agent or servant, issues or aids in issuing a negotiable receipt for such goods which does not state such ownership, shall be fined not more than one thousand dollars or imprisoned not more than one year, or both, for each offense. (99 v. 411, § 53.)

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Sec. 13122. Delivering goods without obtaining receipt.

Whoever, being a warehouseman, his officer, agent or servant, delivers goods out of his possession knowing that a negotiable receipt, the negotiation of which would transfer the right to the possession of such goods, is outstanding and uncancelled without obtaining possession of such receipt at or before such delivery, except when such receipt is lost or destroyed and proceedings had according to law or the goods for which such receipt was given have been lawfully sold to satisfy such warehouseman's lien or have been lawfully sold or disposed of because of their perishable or hazardous nature, shall be fined not more than one thousand dollars or imprisoned not more than one year, or both, for each offense. (99 v. 411, § 54.)

Sec. 13123. Negotiating receipt with intent to deceive.

Whoever deposits goods with a warehouseman to which he has no title or upon which there is a lien or mortgage and takes therefor a negotiable receipt which he negotiates for value with intent to deceive and without disclosing his want of title or the existence of such lien or mortgage, shall be fined not more than one thousand dollars or imprisoned in the penitentiary not more than one year, or both, for each offense. (99 v. 411, § 55.)

Sec. 13124. Meaning of words.

In the next six preceding sections, the following words shall mean: "warehouseman," a person lawfully engaged in the business of storing goods for profit; "receipt," a warehouse receipt; "goods," chattels or merchandise in storage or which have been or are about to be stored; and "owner"' does not include mortgagee or pledgee. (99 v. 411, § 58.)

Sec. 13125. Selling or conveying land without title.

Whoever, with intent to defraud, knowingly sells or conveys land or an interest therein, without having title to it either in law or equity, by descent, devise, written contract or deed of conveyance, shall be imprisoned in the penitentiary not less than one year nor more than seven years. (R. S. § 7079; 33 v. 33, § 33; S. & C. 415; 102 v. 115.)

Sells or conveys.—When, in an indictment under this section, it is charged that the accused sold *and* conveyed the land, such indictment is not subject to the objection that two offenses are charged therein. Kerr v. State, 36 O. S. 614.

The provisions of the section are not repugnant upon the ground that by their terms it is made an offense to *convey* land, where the party has no title. To execute

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to another an instrument in the form of a conveyance of land, with intent to defraud, is the crime inhibited in the section. Kerr v. State, 36 O. S. 614.

Land, or any interest therein.—This section applies as well to instruments purporting to convey lands situated beyond our territorial limits as to those purporting to convev lands situated within this state. Kerr v. State, 36 O. S. 614.

Indictment.—In an indictment under this section for conveying land, it is not necessary that a copy of the deed be set forth. Kerr v. State, 36 O. S. 614.

In an indictment under this section it is not necessary, where the instrument purports to convey land situated in another state, to aver in the indictment, in terms, that the deed was in the form of a proper conveyance of land under the laws of such state. Kerr v. State, 36 O. S. 614.

It is sufficient if it be averred in the indictment that the conveyance was by deed of general warranty. Kerr v. State, 36 O. S. 614.

FORMS OF CHARGES.

Selling land without title, by deed.

Did unlawfully, fraudulently, and knowingly sell and convey to one M N, by deed of general warranty, dated ———, A. D. ———, a certain tract of land, to-wit: (describe the land as described in the deed), without having a title to said tract of land, either in law or equity, by descent, devise, written contract, or deed of conveyance, with intent thereby to defraud.

Selling land without title, by written contract.

Did unlawfully, fraudulently, and knowingly sell to one M N, by a written contract, a certain tract of land, to-wit: (describe the land as described in the written contract), the said E F, then and there not having any title to said land, either in law or equity, by descent, devise, written contract, or deed of conveyance, with intent thereby to defraud.

Sec. 13126. Making fraudulent transfers to defeat creditors.

Whoever fraudulently makes or transfers a bond, bill, deed of sale, gift, grant, or other conveyance to defeat his creditors of their just demands, shall be fined not less than twenty dollars nor more than five hundred dollars or imprisoned not more than ten days, or both. (R. S. § 7080; 70 v. 40, § 2; S. & C. 703.)

This section was not intended to prevent creditors from obtaining relief in civil proceedings. Brice v. Myers, 5 O. 121.

Where A and B conspire with a husband to defraud his wife of alimony and dower in the husband's property, and in pursuance thereof, A, who holds the legal title to the real estate of the husband, in trust, conveyed it to B and he mortgages the real estate for its value to an innocent mortgagee, and gives the husband the proceeds of the mortgage debt to aid him in converting his property into money and leave the state, A and B are liable in damages to the wife for the amount of her judgment for alimony and the present worth of her dower interest, not in excess of the reasonable value of the real estate so transferred. Iddings v. Whitacre, 1 O. A. R. 223, 19 C. C. (N.S.) 336, 24 O. C. D. 427.

FORM OF CHARGE.

Fraudulent conveyance to defeat creditors.

Was largely indebted to divers persons, creditors of the said E F, to-wit, to one M N, in the sum of ——— dollars, upon a certain promissory note; to one O P, in the sum of ——— dollars, upon a book account, and also to sundry other persons to the ——— aforesaid unknown, in divers sums; and that the said E F, then and there, unlawfully and fraudulently did make and transfer to one

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C D a certain deed of sale for the conveyance to the said C D of a large tract of land, to-wit, eighty acres of land, situate at (etc.), then owned by him, the said E F, with intent thereby to defraud his said creditors of their said just demands.

Sec. 13127. Making or using false gas meters.

Whoever, with intent to defraud, constructs or uses a false meter for measuring and registering the gas consumed under a contract with a gas company, shall be fined not more than five hundred dollars or imprisoned not more than thirty days, or both. (R. S. § 7071; 56 v. 79, § 2; S. & C. 351.)

FORM OF CHARGE.

Using a false meter.

Being then and there the manager (or other officer) of The ——— Gas Company, a company duly organized under the laws of the state of ———, and then and there doing business in said county, he, the said E F, being charged with the duty of supplying the meters for registering the gas used by the consumers under a contract with the said company, and the said E F then and there did provide for use, and did cause to be used, and did use meters that were false in this that they did not register correctly the gas used, but registered a larger amount than the amount consumed, and unlawfully and wilfully and with the intent to cheat and defraud, the said E F did deliver such false meter to one M N, and did cause the said M N to use the same with the intent to cheat and defraud the said M N as aforesaid.

Sec. 13128. Failure to mark weights on packages—Transfer of brands—Repacking.

Whoever puts up or packs goods or articles sold by weight, into a case or package, and fails to mark thereon the gross, tare and net weights thereof in pounds and fractions thereof, or, with intent to defraud, transfers a brand, mark, or stamp placed upon a case or package by a manufacturer, to another case or package, or, with like intent, repacks a case or package so marked, branded or stamped with goods or articles of a quality inferior to those of such manufacturer, shall be fined not more than five hundred dollars or imprisoned not more than six months, or both. (R. S. § 7072; 53 v. 69, §§ 2, 3; 62 v. 145, § 1; S. & C. 456; S. & S. 286.)

FORM OF CHARGE.

Marking false weight upon a barrel or box, etc.

Unlawfully and wilfully did put up and pack one certain barrel (or, box, or, cask, etc.) of sugar (or other article, naming it), for the purpose of merchandise and sale by the barrel, and the said E F did not then and there, nor at any time, mark or cause to be marked upon said barrel the exact number and fractions of pounds

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that the same then and there weighed, nor the true net weight of said sugar therein contained; but the said E F did there unlawfully, wilfully and fraudulently mark upon said barrel the number of ten pounds as and for the true weight of said barrel, and the number of one hundred and ninety pounds as and for the true weight of the sugar so put and contained therein, whereas the true weight of said barrel was then and there twenty pounds, and the true weight of said sugar was then and there not more than one hundred and eighty pounds, all of which he, the said E F, then and there well knew.

Sec. 13129. Fraud in sale of grain, seed, etc.

Whoever, for himself or as agent of a corporation, association, company or person, obtains from a person anything of value, or procures his signature as maker, indorser, guarantor or surety to a bond, bill, receipt, promissory note, draft, check or other evidence of indebtedness, as the whole or part consideration for the sale or transfer to such person of grain, seed or other cereals at a fictitious price or equal to or more than twice the market price thereof or as the whole or part consideration for a bond, contract or promise given the vendee of grain, seed or cereals binding the vendor or another person, corporation, company, association or the agent thereof, to sell for such vendee grain, seed or cereals at a fictitious price or equal to or more than twice the market price thereof, or sells, barters or disposes of, or offers so to do, a bond, bill, receipt, promissory note, draft, check or other evidence of indebtedness, knowing it to have been obtained as the whole or part consideration for the sale or transfer, to the maker thereof or indorser, guarantor or surety thereon, of grain, seed or cereals which have been so sold or transferred at a fictitious price or equal to or more than twice the market price thereof or, as the whole or part consideration for a bond contract or promise given the vendee of grain, seed or cereals binding on the vendor or another person, corporation, company, association or the agent thereof, to sell for such vendee grain, seed or cereals at a fictitious price or equal to or more than twice the market price thereof, shall be fined not less than one hundred dollars nor more than five hundred dollars or imprisoned in the penitentiary not less than one year nor more than three years, or both. (83 v. 162, § 1; R. S. 7069-5.)

Sec. 13130. Defrauding livery stable keepers, etc.

Whoever, with intent to defraud the owner or keeper of a livery stable, hires from him a horse, mare, stallion, filly, gelding, pony, mule or hack, carriage, buggy, surrey, wagon, sleigh or sled, bicycle or automobile, shall be fined not more than twenty-five dollars or imprisoned in

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jail or a workhouse not more than ten days, or both. Refusal to pay the hire thereof or absconding without paying or offering to pay it, shall be evidence of such fraudulent intent. The owner or keeper of such livery stable shall keep a copy of this section, printed in large, plain English type posted in a prominent place in such stable and no conviction shall be had under this section unless the provisions thereof have been complied with by the person making the complaint. (95 v. 306, §§ 1, 2, 3; R. S. § 7076-4.)

Cited to show that the expression "livery hire" in G. C. § 2997 may include hiring automobiles when necessary. State, ex rel., v. Sayre, 12 N. P. (N.S.) 61.

Sec. 13131. Defrauding inn-keepers.

Whoever, with intent to defraud, obtains food, lodging or other accommodations at a hotel, inn, boarding or eating house or private room in or pay-ward of a hospital or sanitarium, shall be fined not more than two hundred dollars or imprisoned in jail or a workhouse not more than three months, or both. Obtaining such lodging, food or other accommodation by false pretense, or by false or fictitious show or pretense of baggage or other property, or refusal or neglect to pay therefor on demand, or payment thereof with negotiable paper on which payment was refused, or absconding without paying or offering to pay therefor, or surreptitiously removing or attempting to remove his baggage, shall be *prima facie* evidence of such fraudulent intent, but this section shall not apply where there has been an agreement for more than ten days' delay in such payment. The proprietor of such hotel, inn, boarding house, hospital or sanitarium shall keep a copy of this section printed in distinct type posted conspicuously in the office, ladies' parlor or sitting room, washroom and five other conspicuous places therein or not less than ten such places in all. (R. S. §§ 7076a, 7076b, 7076c; 83 v. 138; 94 v. 20, 21.)

FORM OF CHARGE.

Defrauding a hotel keeper.

Unlawfully, wilfully and with intent to defraud, did obtain food and lodging at a certain hotel, then and there situate, to-wit, at the ——— Hotel, and left the same without paying anything whatever to M N, the proprietor thereof, and defrauding the said proprietor out of the sum of ——— dollars, the said proprietor not making any agreement with the said E F for any delay in payment, and said proprietor keeping a copy of § 13131 of the General Code posted conspicuously to the number and in the places in said hotel as provided by said section.

Sec. 13132. False statement by medical examiner of insurance company.

Whoever, being a medical examiner for a life insurance company or for an applicant for insurance therein, knowingly makes a false state-

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ment or report to such company or to an officer thereof, concerning the health or physical condition of an applicant for insurance, or other matter or thing affecting the granting of such insurance, shall be fined not more than five hundred dollars or imprisoned not more than three months. (R. S. § 7078; 69 v. 159, § 31.)

FORM OF CHARGE.

Medical examiner making false statement.

Being then and there the medical examiner of a certain life insurance company, called ———, did examine one M N as to the health and bodily condition of him, the said M N, he, the said M N, being then and there an applicant for insurance in said (name the company), and did make a report as to the health and bodily condition of the said M N, to said (name the company), in which said report the said E F unlawfully and falsely did state and pretend (set out the false statement), with intent to defraud the said (name the company), whereas in truth and in fact (negative the false statement); and the said E F, at the time he so falsely stated and pretended as aforesaid, well knew said false statement to be false.

Sec. 13133. Fraudulently obtaining money from insurance companies.

Whoever obtains or attempts to obtain from a life or accident insurance company, money on a policy issued by such company in this state, by falsely and fraudulently representing the insured to be dead, or procures such policy to be issued to or in a fictitious or assumed name and falsely represents the fictitious person so insured to be dead, thereby obtaining or attempting to obtain from such company the amount of such insurance or part thereof, or obtains insurance upon the life of another not applying for such insurance, or attempts to obtain insurance upon another's life for his own benefit without the knowledge of the person to be insured, or falsely obtains or attempts to obtain money from such company upon a policy by a false and fraudulent written representation or affidavit that the insured is dead or injured, shall be imprisoned in the penitentiary not more than fifteen years, or, when the money so obtained or attempted to be obtained is less than thirty-five dollars, shall be fined not more than five hundred dollars or imprisoned not more than six months, or both. (R. S. § 7084; 85 v. 119; 64 v. 229, § 1; S. & S. 273.)

FORM OF CHARGE.

Fraudulently obtaining money from an insurance company.

Did obtain for the benefit of the said E F a policy of life insurance in the ——— company, a company duly organized under the laws of the state of ———, and duly authorized to transact business in the State of Ohio, and doing business in said county and state, an insurance policy upon the life of one M N in the sum of ——— dollars, then and there in full force, and then and there on the ———,

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day of ———, A. D. 19—, said E F, by false and fraudulent written representations, made to said insurance company, falsely and fraudulently represented to the said company that the said M N was dead, and then and there falsely and fraudulently, wilfully and unlawfully did obtain from said company on said insurance policy the sum of ——— dollars, when the said M N was not dead, but was still living, as the said E F well knew, and with intent to defraud the said insurance company.

Sec. 13134. Life insurance—Official or agent issuing fraudulent policies.

Whoever, being a trustee, officer, agent or employe of a corporation, company or association, organized to transact the business of life or accident or life and accident insurance on the assessment plan, knowingly insures a person or permits him to be insured without that person's knowledge or consent, or insures a fictitious person, a person over sixty-five or under fifteen years of age, or a sickly or infirm person, shall be fined not less than one hundred dollars nor more than one thousand dollars or imprisoned not more than six months, or both. (R. S. § 3630g; 82 v. 138; 80 v. 179.)

Sec. 13135. Physician abetting same.

Whoever, being a physician or other person, knowingly aids in or abets any person in effecting insurance described in the next preceding section, or in effecting insurance of his own life, shall be fined not less than one hundred dollars nor more than one thousand dollars or imprisoned not more than six months, or both. (R. S. § 3630g; 82 v. 138; 80 v. 179.)

Sec. 13136. Changing life insurance policy.

Whoever, being a life insurance company doing business in this state, or an agent thereof, makes a contract of insurance, or an agreement as to such contract, other than is plainly expressed in the policy issued thereon, shall be fined not less than one hundred dollars nor more than five hundred dollars or imprisoned not more than thirty days, or both. (90 v. 345, § 3; R. S. 3631-6.)

Sec. 13137. Rebates and other inducements from life insurance companies.

Whoever, being a life insurance company doing business in this state, or an officer, agent, solicitor or representative thereof, pays, allows, gives, or offers to pay, allow or give, directly or indirectly, as an inducement to insurance, a rebate of the premium payable on a

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policy, or a special favor or advantage in the dividends or other benefits to accrue thereon, or a paid employment or contract for services of any kind or any valuable consideration or inducement not specified in the policy of insurance, or gives, sells or purchases, or offers to give, sell or purchase as an inducement for insurance, any stocks, bonds or securities of an insurance company or other corporation, association or partnership, or any dividends or profits to accrue thereon, or anything of value not specified in the policy, shall be fined not less than one hundred dollars nor more than five hundred dollars or imprisoned not more than thirty days, or both. (90 v. 345, § 3; R. S. 3631-6.)

Sec. 13138. Soliciting membership in unauthorized fraternal beneficiary association.

Whoever solicits membership or assists in procuring membership in a fraternal beneficiary association not licensed or authorized by law to do business in this state, shall be fined not less than fifty dollars nor more than two hundred dollars. (97 v. 432, § 30; R. S. 3631-23q.)

Sec. 13139. Failure to comply with laws relating to same.

Whoever, being a fraternal beneficiary association, or an officer, agent or employe thereof, neglects or refuses to comply with or violates any provision of law relating to such association the penalty for which is not specified elsewhere, shall be fined not more than two hundred dollars. (97 v. 432, § 30; R. S. 3631-23q.)

Sec. 13140. Fraud by official or medical examiner of fraternal beneficiary association.

Whoever, for himself or as an officer, member or physician of a fraternal beneficiary association, as created and defined by law, wilfully makes a false or fraudulent representation in, or with reference to, an application for membership therein or for obtaining money therefrom or benefit therein, shall be fined not less than one hundred dollars nor more than five hundred dollars or imprisoned in jail not less than thirty days nor more than one year, or both. (97 v. 432, § 30; R. S. 3631-23q.)

Sec. 13141. Fraud by certificate holder in such association.

Whoever wilfully makes a false representation of a material fact or thing in a sworn statement as to the death or disability of a certificate holder in a fraternal beneficiary association, as created and defined by law, for procuring the benefit named in the certificate of such holder,

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or wilfully makes a false statement in a report or declaration under oath required or authorized by the law creating such association, shall be imprisoned in the penitentiary not less than three years nor more than ten years. (97 v. 432, § 30; R. S. 3631-23q.)

Sec. 13141-1. Suppressing facts—Penalty.

Whoever being an officer, director, trustee, agent or employe of any insurance company, fraternal beneficiary association or assessment association organized under the laws of this state shall wilfully and with intent to deceive the superintendent of insurance or any person interested therein respecting the true financial condition of such company, fraternal beneficiary association or assessment association mutilate, destroy, or falsify any of its books, records, proofs, letters, papers, or documents, or suppress, withhold or conceal any of the same from any person authorized by law to investigate the true financial condition of such company, fraternal beneficiary association or assessment association shall be imprisoned in the penitentiary not more than three years nor less than one year. (101 v. 102.)

Sec. 13142. Frauds by partners.

Whoever, being a partner, is guilty of fraud in the affairs of the partnership, shall be fined not more than five hundred dollars or imprisoned not more than six months, or both, and be liable in damages to the party injured. (R. S. § 7077; 44 v. 29, § 16; S. & C. 905.)

FORM OF CHARGE.

Fraud by a partner.

That A B, C D and E F were partners, and then and there each was a member of the certain partnership then and there carried on under the style and firm name of ———; that the said E F wilfully, unlawfully and fraudulently did (here set forth in full the fraud committed and its relation to the partnership affairs), with intent then and there and thereby to cheat and defraud the said A B and C D, and then and there knowingly, wilfully and unlawfully did cheat and defraud the said A B and C D in the affairs of the said partnership.

Sec. 13143. Frauds of owners on consignees.

Whoever, being a person in whose name property has been shipped or delivered for shipment to a warehouse keeper, factor or agent, receives from the consignee thereof an advancement thereon of money or negotiable security, and, with intent to defraud and without the consent of such consignee, disposes of such property otherwise than as agreed with the consignee at the time of such advancement, shall be im-

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prisoned in the penitentiary not less than one year nor more than three years. This section shall not extend to a person paying or offering to pay to such consignee such advancement before disposing of such property. (R. S. § 7087; 44 v. 34, § 2; S. & C. 422.)

FORM OF CHARGE.

Consignor of goods, other than the owner, changing the consignment, after receiving negotiable security in payment.

At the township of ———, in said county, did deliver in his own name to one O P, the keeper of a certain warehouse, at the warehouse of the said O P, there situate, certain merchandise, to-wit (describe it), of the value of one thousand dollars, of the goods and merchandise of one C D, and the same merchandise, he, the said E F, did then and there voluntarily consign to one M N, at and of the incorporated village of ———, in the county of ———, in the State of Ohio aforesaid, upon an agreement made and entered into between the said E F and the said M N, that (give the substance of the agreement in full); and afterward, to-wit, on the ——— day of ———, in the year aforesaid, the said M N did give to the said E F, in pursuance of the agreement aforesaid, for the merchandise aforesaid, a certain negotiable security, to-wit, (describe the negotiable instrument given, as a promissory note, or other instrument, according to the fact), for the sum of ——— dollars, and after the giving to said E F of the negotiable security aforesaid, by the said M N, consignee as aforesaid, to-wit, on the ——— day of ———, in the year last aforesaid, at the township of ——— aforesaid, in the county of ——— aforesaid, the said E F, without the consent of the said M N, consignee as aforesaid, being therefor first had and obtained, did unlawfully, wilfully and fraudulently make another disposition of said merchandise, different from and inconsistent with that disposition agreed upon between the said E F and the said M N, consignee as aforesaid, at the time of said negotiable security being so given as aforesaid, that is to say, the said E F did (set out what other disposition was made), with intent to defraud and injure the said M N, consignee as aforesaid; the said E F, then and there, before the last-named disposition of said merchandise, not having then paid, or offered to pay to the said M N, consignee as aforesaid, the full amount of said negotiable security, so given as aforesaid, nor any part thereof.

Sec. 13144. Sending letters, etc., to obtain money.

Whoever, with intent to defraud and to obtain property of value, writes, prints or sends to another the whole or part of a letter, telegram or other instrument, if the value of the property intended to be obtained is thirty-five dollars or more, shall be imprisoned in the penitentiary not less than one year nor more than five years, or, if less than that sum, shall be fined not more than fifty dollars or imprisoned not less than ten days nor more than sixty days, or both. (R. S. § 7088; 93 v. 168; 73 v. 19, § 1.)

An indictment against one for sending a telegram in the name of another, with intent to defraud, must, as against a person other than a telegraph operator, show

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that the person knowingly sent a dispatch not authorized by the one whose name is signed. Jacoby v. State (Ham. Dist. Court), 3 W. L. B. 1145.

In order to make a good indictment under this section, it is necessary to set forth the fact that the instrument was written partly or wholly by the defendant, and to set forth the instrument, or the parts so written, and allege that it was done with the intent to obtain something of value, and with the intent to defraud. State v. Hoffman, 1 N. P. 290; 2 O. D. 206.

It is not sufficient that a count contain all that there is in the statute, but it must contain averments going to show that the "instrument" is one calculated to mislead. State v. Gibbs, 9 N. P. N. S. 129; 20 O. D. 1.

A charge of "obtaining money by false pretenses" will lie where an intent to defraud is shown, notwithstanding the accused did not receive the money personally. State v. Perrin, 9 N. P. N. S. 97.

Sec. 13145. Practicing astrology, fortune-telling, clairvoyancy or palmistry.

Whoever, not having been legally licensed so to do, represents himself to be an astrologer, fortune-teller, clairvoyant or palmister, shall be fined not less than twenty-five dollars nor more than one hundred dollars or imprisoned in the jail not less than thirty days nor more than three months, or both. (94 v. 363, §§ 1, 2; R. S. 7017-4, 5.)

A representation that the accused is a spirit medium, made to one person only, does not constitute a violation of R. S. § 7017-4 (G. C. § 13145), making it a misdemeanor for one to represent himself to be an astrologer, a fortune teller, a clairvoyant or a palmister. Wolf v. State, 24 C. C. (N.S.) 526.

Section 13145 does not violate the section of the bill of rights guaranteeing religious freedom, but is a valid and enforcible enactment. Haas v. State, 26 C. C. (N.S.) 545.

Sec. 13146. Misrepresentation by married man.

Whoever, being a married man, fraudulently represents himself to be unmarried and makes proposals of marriage to an unmarried female of good character, or repeatedly calls on or keeps company with such female upon such false representation, shall be fined not less than one hundred dollars nor more than three hundred dollars or imprisoned in jail not less than six months nor more than two years, or both. (90 v. 131, § 1; R. S. § 7105-1.)

Sec. 13147. Placing in packages other substances than tobacco.

Whoever intentionally places or causes to be placed in a hogshead, barrel, box, package or parcel of leaf tobacco, a substance other than tobacco, with intent that such hogshead, barrel, box, package or parcel shall be exposed to sale or sold, and that the purchaser thereof shall be in ignorance of such substance, or falsely packs or causes to be packed, in a manner commonly known as "nesting," a hogshead, box, package or parcel of leaf tobacco, with intent that it shall be exposed to sale or sold, and that the purchaser thereof shall be in ignorance of its real character, or delivers or causes to be delivered for sale, a hogshead, box, package or parcel of tobacco containing such foreign substance or falsely packed and nested tobacco, to a warehouseman, com-

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mission merchant, dealer in tobacco or manufacturer thereof, knowing it to contain such foreign substance or to be so falsely packed or nested, with intent that it shall be sold to purchasers ignorant of its real character, or changes or alters a sample selected by an inspector, as provided by law, with intent to defraud a purchaser or other person, shall be fined not less than one hundred dollars nor more than five hundred dollars or imprisoned in jail not less than thirty days nor more than six months, or both, and be liable in damages to the inspector and person injured for the amount of such injury. (R. S. § 4355a; 78 v. 242, 243.)

Sec. 13148. Unlawful to perform dramatic composition without consent of owner.

Whoever causes to be publicly performed or represented for profit an unpublished or undedicated dramatic or musical composition known as an opera, without the consent of its owner or proprietor, or, knowing that such composition is unpublished or undedicated and without the consent of its owner or proprietor, permits, aids or takes part in such performance or representation, shall be fined not less than fifty dollars nor more than three hundred dollars or imprisoned not less than thirty days nor more than three months, or both. (95 v. 68, § 1; R. S. 7017-6.)

Sec. 13149. Taking or selling note for patent right.

Whoever takes, purchases, sells or transfers a promissory note or other negotiable instrument not having the words "given for a patent right" legibly and prominently written or printed on its face, above the signature thereto, knowing the consideration thereof to consist in whole or in part of the right to make, use or vend a patented invention or invention claimed to be patented, shall be fined not more than five hundred dollars or imprisoned not more than forty days, or both. (R. S. § 6993; 66 v. 93, § 2.)

Constitutionality of section.—This section is not in conflict with § 8 of the first article of the Constitution of the United States, nor of the act of Congress enacted in pursuance thereof relating to the granting of letters patent. Tod v. Wick Bros. & Co., 36 O. S. 370.

This section is in contravention of the Constitution and laws of the United States, and is therefore null and void. *In re* Lake, U. S. Cir. Ct. Northern Dist. of Ohio, 11 W. L. B. 308, 6 O. F. D. 58.

Negotiable instrument.—The act making it a penal offense to take a "promissory note or other negotiable instrument," not containing the words "given for a patent right," knowing the consideration thereof to be patented invention,

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does not include, in such offense, the taking of notes or instruments not negotiable. State v. Brewer, 30 O. S. 101.

Given for patent right.—The act of May 4, 1869 (Sayler, chap. 1668), regulating the execution and transfer of notes "given for patent rights," relates only to the instruments named in the act, when given for an interest in the invention, secured to a patentee by letters patent, and does not include in its provisions negotiable paper given for machines built under letters patent, given to secure the agency to sell machines so built, in certain specified territory. State v. Peck, 25 O. S. 26.

Indictment.—An indictment which does not show that the note or instrument on which it is founded was negotiable, does not show an offense under this section, and may be met by demurrer. State v. Brewer, 30 O. S. 101.

Sec. 13149-1. Penalty.

Whoever, having accepted a premium note, in payment of the purchase price of a policy of insurance, sells or assigns such note prior to the delivery and acceptance of such policy, shall be fined not more than five hundred dollars or imprisoned not more than six months, or both. (101 v. 120.)

Sec. 13150. Vending impure seed.

Whoever knowingly sells grass or other seed in which there is seed of the Canada thistle, white or yellow daisy or wild carrot, or, being the owner, occupier or possessor of land, permits a Canada thistle, teasel or wild carrot to ripen seed thereon or on the adjoining highway, shall be fined twenty dollars. (R. S. § 7001; 81 v. 17; 42 v. 37, § 2; S. & C. 451.)

Sec. 13151. Selling bonds, certificates, etc., for companies not complying with law.

Whoever, being an officer, agent or representative of a corporation, partnership or association, other than a building and loan company, engaged in placing or selling certificates, bonds, debentures or other investment securities on the partial payment or installment plan, or of an investment guarantee company doing business on the service dividend plan, attempts to place or sell certificates, debentures or other investment securities or transact business in the name or on behalf thereof, when such company, partnership, association or guarantee company has failed or refuses to comply with any provision of law or to file with the supervisor of bond investment companies the statement or report required to be filed by law, shall be fined not less than one hundred dollars nor more than one thousand dollars or imprisoned in the

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county jail not less than thirty days nor more than six months, or both. (94 v. 150, § 9; 93 v. 150; R. S. § 3821z.)

This section applies only to the companies designated therein and has no application to companies authorized to be incorporated under R. S. § 3799 (repealed, 99 v. 296); so that a violation of R. S. § 3797, would not be criminal and would not render the companies and its agents subject to the penalties prescribed in this section. Bank Co. v. Miller, 1 C. C. (N.S.) 569, 14 O. C. D. 198.

Sec. 13152. Adulteration of materials used in the manufacture of crockery ware.

Whoever purposely and maliciously places or causes to be placed into or upon flint, spar, clay, glaze, or other ingredient or composition thereof used in the manufacture of earthenware, c. c. granite, porcelain, china or other pottery-ware, any cobalt, soap, salt, sand, earth or other material which tends to adulterate or injure it, shall be imprisoned in the penitentiary not less than one year nor more than seven years. (93 v. 313, § 1; R. S. 7090-1.)

Sec. 13153. Fraudulent filing of labor union trade-mark.

Whoever, for himself or for another person, association or union, procures the filing of a label, trade-mark, term, designation or form of advertisement in the office of the secretary of state, under the provisions of law entitling it to be filed through or for an association or union of working men, by making a false or fraudulent representation or declaration or by other fraudulent means, shall be fined not more than two hundred dollars and be liable in damages to the person injured thereby. (R. S. § 4364-52; 94 v. 170.)

Sec. 13154. Unauthorized use of same.

Whoever uses or displays the genuine label, union shop card, trade-mark, term, design, device or form of advertisement, or the name or seal, or any imitation, likeness, or counterfeit of the genuine label, union shop card, trade-mark, term, design, device or form of advertisement, or name or seal, of any association or union in any manner, not being authorized so to do by such union or association, shall be deemed guilty of a misdemeanor and shall be punished by a fine of not less than twenty-five dollars ($25.00) nor more than two hundred dollars ($200.00). (R. S. § 4364-53a; 99 v. 483; 94 v. 171; 91 v. 192, § 5; 89 v. 167, § 5; 102 v. 420.)

Sec. 13155. Unauthorized use of name or seal of labor union.

Whoever in any way uses the genuine label, union shop card, trade-mark, term, design, device or form of advertisement, or the name of seal, or any imitation, likeness, or counterfeit of the genuine label, union shop card, trade-mark, term, design, device or form of advertisement, or name or seal, of any association or union or officer thereof, in

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and about the sale of goods or otherwise, not being authorized to so use the same, shall be guilty of a misdemeanor, and shall be punished by a fine of not less than twenty-five dollars ($25.00) nor more than two hundred dollars ($200.00). (R. S. § 4364-53b; 99 v. 483; 94 v. 171; 91 v. 192, § 5; 89 v. 167, § 5; 102 v. 420.)

Sec. 13156. Unauthorized use of timber dealers' trade-mark.

Whoever knowingly uses or attempts to use a trade-mark, adopted as required by law by a person, firm or corporation dealing in timber, without the written consent of the owner thereof, shall be fined not less than twenty dollars nor more than two hundred dollars, and be liable to the owner thereof for all damages sustained thereby. (80 v. 195, § 3; R. S. 4364-57.)

Sec. 13157. Fraudulently placing such trade-mark on the property of another.

Whoever falsely or fraudulently places a trade-mark on timber which is not the property of the person, firm or corporation dealing in timber which has legally adopted such trade-mark, shall be fined not less than one hundred dollars nor more than five hundred dollars or imprisoned not less than one month nor more than twelve months. (80 v. 197, § 7; R. S. 4364-61.)

Sec. 13158. Furnishing false pedigree.

Whoever wilfully furnishes the purchaser of an animal with a false pedigree or false certificate of sale, or wilfully uses a false pedigree or false certificate of sale for deceiving, whether furnished, given or procured in this state or elsewhere, shall be fined not less than twenty-five dollars nor more than five hundred dollars or imprisoned in jail not more than six months, or both. (88 v. 64, § 1; R. S. 7076-3.)

Sec. 13159. Fraudulent entry of horse in contest of speed.

Whoever knowingly enters or causes to be entered for competition in a contest of speed for a purse, prize, premium, stake or sweep-stakes offered or given by an agricultural or other society, association, or person, a horse, mare, gelding, colt or filly under an assumed name or out of its proper class shall be imprisoned in the penitentiary not less than one year nor more than three years. (90 v. 8, §§ 1, 2; 88 v. 547; R. S. 4221-7.)

Sec. 13160. Driving painted or disguised horse for premium.

Whoever, for the purpose of competing for purses or premiums, designedly enters or drives a horse, gelding, mare, colt or filly which has been painted, disguised or represents one other than that which is pur-

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ported to be entered, or designedly drives it in a class to which it does not properly belong, shall be imprisoned in the penitentiary not less than one year nor more than three years. (90 v. 8, §§ 2, 5; 88 v. 547; R. S. 4221-8-11.)

Sec. 13161. Misrepresentation or fraudulent concealment in speed contest.

Whoever knowingly misrepresents or fraudulently conceals a public performance in a former contest or trial of speed of a horse, gelding, mare, colt or filly which he proposes to enter or enters for competition for a purse, prize, premium, stake or sweep-stakes, offered or given by an agricultural or other society, association or person, shall be imprisoned in the penitentiary not less than one year nor more than three years. (90 v. 8, 9, §§ 2, 6; 88 v. 547; R. S. 4221-8-12.)

Sec. 13162. Unlawful obtaining of registry or transfer in a herd book.

Whoever, by false pretense, obtains from a register of a club, association, society or company for improving the breed of jersey cattle, a certificate of registration of an animal, or a transfer of such registration, or knowingly gives a false pedigree of a jersey animal shall be fined not more than five hundred dollars or imprisoned not more than six months, or both. Such offender may be prosecuted in the county in which such certificate of registration or transfer has been obtained or in the county where such false pretense has been made. (84 v. 213, §§ 1, 2; R. S. 7076-1, 2.)

Sec. 13163. Wearing badge or button of certain organizations.

Whoever, not being entitled so to do under the rules and regulations thereof, wilfully wears the badge or button of the grand army of the republic, union veterans' union, sons of veterans', union veterans' legion, military order of the loyal legion, women's relief corps, ladies' circle of the grand army of the republic, the benevolent and protective order of elks of the United States of America, a labor organization, or an order, society or organization of ten years' standing in this state, or uses or wears it to obtain aid or assistance thereby, shall be fined not more than twenty dollars or imprisoned not more than thirty days, or both. (99 v. 114, § 1.)

Sec. 13164. Wearing insignia of civic or religious society.

Whoever, not being entitled so to do under the rules and regulations thereof, wilfully wears the insignia of a civic or religious society of this state, or uses or wears it to obtain aid or assistance thereby, shall be fined not more than twenty-five dollars, or imprisoned not more than sixty days, or both. (86 v. 5, § 1; R. S. 7088-2.)

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Sec. 13165. Labeling of binding twine.

Whoever, being a dealer, manufacturing corporation, company or agent, sells or offers for sale a ball or parcel of binding twine, commonly employed in binding grain, without there is attached thereto a tab or label on which is written or printed the kind of material of which it is composed and the weight of such ball or parcel, shall be fined not less than one dollar nor more than twenty-five dollars. (90 v. 48, § 1; R. S. 7072-1.)

Sec. 13166. Penalty.

Whoever, being an itinerant vendor as designated and described by law, sells or exposes for sale, goods, wares, merchandise, or articles of wearing apparel, without having the state and local licenses as required by law, and whoever, as principal or agent advertises such sale, by circular, hand-bill, newspaper or otherwise before such licenses are issued, shall be fined not less than two hundred dollars nor more than one thousand dollars or imprisoned not more than six months, or both. (101 v. 225; 95 v. 544, § 3; 91 v. 173, § 3; R. S. 4402-3.)

Sec. 13167. Penalty.

Whoever, being an itinerant vendor as described and designated by law, makes a false statement in an original or supplementary application for the state license required by law, or fails to comply with the other requirements of law as to itinerant vendors, shall be fined not less than two hundred dollars nor more than one thousand dollars, or imprisoned not more than six months, or both. (101 v. 225; 91 v. 175, § 6; R. S. 4402-6.)

Sec. 13168. Violating law relating to paints.

Whoever violates any provisions of law relating to the labeling, marking, or stenciling of turpentine, wood turpentine, paints, mixed paints and similar compounds or white lead by manufacturers or distributors thereof shall be fined not more than fifty dollars, and for each subsequent offense shall be fined not less than fifty dollars nor more than one hundred dollars, or imprisoned not less than thirty days nor more than one hundred days, or both. (99 v. 119, § 9; 102 v. 73.)

Sec. 13169. Registration of bottles, tins, tanks, kegs or other containers with secretary of state; filing with county clerk.

Any person, firm or corporation engaged in the manufacturing, bottling, or selling of soda waters, mineral or aerated waters, ginger ale, porter, ale, beer, cider, small beer, milk, cream, lager beer, weiss beer,

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white beer, or other beverages, or medicines, medical preparations, perfumery, oils, compounds, or mixtures, and using in the manufacture, sale and delivery of the same any bottles, siphons, siphon tops, tins, fountain tanks, kegs or other containers, may mark and designate such bottles, siphon, siphon tops, tins, kegs, and other containers with his or its name or other mark or device branded, stamped, engraved, etched, blown or otherwise produced upon the same, and file in the office of the secretary of state and also in the office of the clerk of courts of the county in which his or its principal place of business is situated a description of such name, mark or device and cause such description to be printed once in each week for three weeks successively in a newspaper published in such county. Provided, that if the principal place of business of any such person, firm or corporation is in another state, the filing of such description shall be made in the office of the secretary of state and also in the office of the clerk of courts in any county of this state, and printed for three weeks successively in a newspaper published in such county. When any such person, firm or corporation shall have complied with the provisions of this section, he or it shall thereupon be deemed the proprietor of such name, mark or device and of every such bottle, siphon, siphon top, tin, fountain tank, keg or other container upon which may be branded, stamped, etched, engraved, blown or otherwise produced upon the same, upon the filing with the secretary of state and county clerk, as herein above referred to, such name, mark or device there shall be paid to the secretary of state and the county clerk respectively one dollar for each such name, mark or device so filed. (99 v. 454, § 1; 100 v. 17, § 3; 103 v. 652; 106 v. 108.)

General Code § 13169 relating to the filling and refilling of milk bottles and glass jars, is not repugnant to any constitutional provision and is a valid enactment. Jury v. State, 20 C. C. (N.S.) 139, 25 O. C. D. 514.

This section is valid and constitutional. It does not require that milk be sold only in glass jars or bottles having the name of the vendor blown therein, nor does it prohibit the use of such bottles other than for vending milk. The object of the legislature is to prevent the public from being misled as to the identity of the vendor. State v. Doyle, 17 C. C. (N.S.) 289.

Sections 13169, 13169-1, 13169-2 and 13169-3, General Code, are a valid and constitutional exercise of the police power vested in the general assembly of the state. Renner Brewing Company v. Rolland, 96 O. S. 432.

Sec. 13169-1. Assignment of name, mark or device to another; filing and publishing.

When any person, firm or corporation, having complied with the provisions of section 13169 of this act, assigns by sale or otherwise his

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or its business including such name, mark or device to another person, firm or corporation, the assignee shall have all the rights and immunities and obligations conferred by this act upon the original manufacturer, bottler or seller, relative to said bottles, siphons, siphon tops, tins, fountain tanks, kegs or other containers so assigned, provided such assignee shall, upon such assignment, file in the office of the secretary of state and also in the office of the clerk of courts of the county in which his or its principal place of business is situated a certificate of said assignment, and cause such certificate to be printed once in each week for three weeks successively in a newspaper published in such county. If the principal place of business of such assignee is in another state the filing of such certificate of assignment shall be made in the office of the secretary of state and also in the office of the clerk of courts in any county of this state, and printed once in each week for three weeks successively in a newspaper published in such county. (106 v. 109.)

Sec. 13169-2. Refilling registered container without consent of owner unlawful; to whom section does not apply.

It is hereby declared unlawful for any person, firm or corporation to fill or refill with soda water, mineral or aerated waters, ginger ale, porter, ale, beer, cider, small beer, milk, cream, larger beer, weiss beer, white beer or other beverages, or with medicines, medical preparations, perfumery, oils, compounds, or mixtures, with intent to sell such contents, any bottle, siphon, siphon top, tin, fountain tank, keg, or other container so marked or designated as aforesaid by any name, mark or device of which a description shall have been filed and published, as provided in sections 13169 and 13169-1 of this act; or to deface, erase, obliterate, cover up, or otherwise remove or conceal any such name, mark or device thereon, or to sell, buy, give, take, or otherwise dispose of or traffic in such bottles, siphon, siphon top, tin, fountain tank, keg, or other container without the consent of, or unless the same shall have been purchased from the person, firm or corporation whose name, mark or device shall be in or upon the bottle, siphon, siphon tops, tin, fountain tank, keg or other container so filled, refilled, trafficked in, used, or handled, as aforesaid. The provisions of this section shall not apply to any person, firm or corporation, as to filling or refilling with his or its product any bottle, siphon, tin, fountain tank, keg, or other

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container, owned by and having the name, mark or designation of such person, firm or corporation pursuant to the provisions of this act, when such person, firm or corporation shall have complied with the rules and regulations of the dairy and food division of the agricultural commission of Ohio, relative to the cleansing of such bottles, siphons, siphon tops, tins, fountain tanks, kegs, or other containers. (106 v. 109.)

Sec. 13169-3. Penalties for violations.

Whoever violates any of the provisions of this section shall be punished for the first offense by a fine of fifty cents for each and every such bottle, siphon, siphon top, tin, fountain tank, keg, or other container by him so filled, refilled, sold, bought, used, disposed of, bought or trafficked in; and for each subsequent offense by a fine of not more than five dollars for every such bottle, siphon, siphon top, tin, fountain tank, keg, or other container by him so filled, refilled, used, bought, sold, disposed of, bought or trafficked in, or by imprisonment not to exceed ninety days, or by both such fine and imprisonment in the discretion of the magistrate or court before whom such offense shall be tried. (106 v. 110.)

Sec. 13170. Selling "convict made" goods without label.

Whoever, dealing in goods, wares and merchandise made by convict labor in a penitentiary, prison, reformatory or other establishment where convict labor is employed, knowingly has them in possession for the purpose of sale or offers them for sale, without the brand, label or mark of "convict made" as required by law, or removes, conceals or defaces such brand, mark or label, shall be fined not less than fifty dollars nor more than one thousand dollars or imprisoned not less than ten days nor more than twelve months, or both. (90 v. 320, § 3; 85 v. 92; R. S. 4364-48.)

Sec. 13171. Misrepresentation by officer, director or agent of life insurance company in relation to policy.

Whoever for himself or as an officer, director, agent, solicitor or representative of any insurance company, except fire insurance companies or associations or fraternal benefit societies, doing business in this state, issues or circulates or causes or permits to be issued or circulated any estimate, illustration, circular or statement of any sort misrepresenting the terms of the policies or policy issued or to be issued

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by such company or the benefits or advantages promised thereby or the dividends or shares or surplus to be received thereon, or uses any name or title of any policy or class of policies misrepresenting the true nature thereof or makes any misrepresentation to induce any person to take out a policy of insurance or makes any misrepresentation to any person insured in any such insurance company for the purpose of inducing or tending to induce such person to lapse, forfeit or surrender his said insurance, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than one hundred dollars nor exceeding five hundred dollars or imprisoned in the jail of the county for a period not exceeding thirty days, or both, at the discretion of the court, and shall pay the costs of the prosecution, and the fines which shall be levied and collected for the violation of any of the provisions of this section shall be paid to the county treasurer for the benefit of the common school fund; and upon any such conviction the superintendent of insurance shall revoke the license of the person so offending for not more than one year. (99 v. 176, § 3; 102 v. 511; 106 v. 235.)

Sec. 13172. Misrepresentations in advertisement by insurance company.

Whoever, being an insurance company, corporation or association authorized to transact business in this state, or an agent thereof, by advertisement in a newspaper, magazine or periodical or by a sign, circular, card, policy of insurance, certificate or renewal thereof, or otherwise, states or represents that funds or assets are in its possession, not actually possessed by it and available for the payment of losses and claims and held for the protection of its policy holders or creditors, or advertises a subscribed capital not actually paid up in cash, shall be fined five hundred dollars, and for each subsequent offense shall be fined one thousand dollars. (99 v. 177, 178, §§ 1, 3.)

Sec. 13173. Such advertisement not corresponding with verified statement.

Whoever, being an insurance company, corporation or association authorized to transact business in this state, purporting to make known its financial standing by an advertisement, public announcement or by making or issuing a circular or card, fails to correspond in all the particulars which it so purports to make known, with the last preceding verified statement made by it to the insurance department of any state, shall be fined five hundred dollars, and for each subsequent offense, shall be fined one thousand dollars. (99 v. 178, §§ 2, 3.)

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Sec. 13174. Disbursements by domestic life insurance companies.

Whoever, being a domestic life insurance company making a disbursement of one hundred dollars or more, fails to have it evidenced by a voucher signed by or on behalf of the person, firm or corporation receiving the money and correctly describing the consideration thereof, or, if such expenditure be for both services and disbursements, fails to set forth in such voucher, the service rendered and an itemized statement of the disbursement made, or, if such expenditure was in connection with a matter pending before a legislative or public body or a department or officer of any state or government, in addition to the foregoing, fails to correctly describe in such voucher the nature of the matter and of the interest of such company therein, shall be fined not less than ten dollars nor more than one thousand dollars. If such voucher can not be obtained such expenditures must be evidenced by an affidavit describing the character and object of the expenditure and stating the reasons for not obtaining such voucher. (99 v. 177, 178, §§ 1, 2.)

Sec. 13175. Publishing or permitting fraudulent prospectus, etc., relating to financial condition of corporation and individual.

Whoever knowingly makes or publishes, or permits or causes to be made or published, a book, prospectus, notice, report, statement, exhibit or other publication of or concerning the affairs, financial condition or property of a corporation, joint stock association, co-partnership or individual, containing a statement which is false or wilfully exaggerated and intended to deceive any person as to the real value of any shares, bonds or property or part thereof, of said corporation, joint stock association, co-partnership or individual, shall be fined not less than one hundred dollars nor more than ten thousand dollars or imprisoned in the penitentiary not less than one year nor more than five years, or both. (99 v. 336.)

Sec. 13176. Unlawfully practicing as certified public accountant.

Whoever represents himself as having received from the state board of accountancy a certificate of his qualifications to practice as a public expert accountant as provided by law, or practices as a certified public accountant or uses the abbreviations "C. P. A." or other similar words or letters to indicate that he is qualified to practice in this state as a certified public accountant, without having received such certificate as provided by law, or, having had such certificate revoked as provided by law, continues to practice as a public accountant, shall be fined not less than ten dollars nor more than one hundred dollars for each offense. (99 v. 333, § 8.)

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Sec. 13177. Using fraudulent ticket at Chautauqua assemblies, etc.

Whoever, with intent to defraud a company incorporated for holding Chautauqua assemblies or the encouragement of religion, art, science or literature, or the general dissemination of knowledge or two or more of such purposes, or a corporation owning or conducting a camp ground or park by means of a ticket, contract or other non-negotiable writing, entitling the person therein named to enter or remain upon such grounds falsely personates such person or remains on such grounds without the right so to do or attempts to leave such grounds ignoring the demand for payment of entrance thereto, shall be fined not less than five dollars nor more than one hundred dollars or imprisoned in a workhouse or jail not less than ten days nor more than thirty days, or both. Mayors, police justices and justices of the peace of the respective counties wherein any part of such grounds are located, shall have jurisdiction of such offenses. (99 v. 92, §§ 5, 6.)

Sec. 13178. Selling cask without defacing brand of oil inspector.

Whoever, selling or dealing in illuminating oils produced from petroleum, sells or disposes of an empty barrel, cask or package which has been branded by the inspector or a deputy inspector, before cancelling, removing and effacing such brand, shall be fined fifty dollars for each barrel, cask or package so sold or disposed of. (R. S. § 399, 6956; 81 v. 140, 144; 77 v. 147, 151; 75 v. 564, §§ 5, 6.)

Sec. 13179. Falsely branding cask of illuminating oil.

Whoever falsely brands a package, cask or barrel containing illuminating oil, in violation of the provisions of law as to the brand thereon to be affixed by the inspector of oils or his deputy, shall be fined not less than one hundred dollars nor more than five hundred dollars or imprisoned in jail not more than six months, or both. (R. S. § 397; 81 v. 140, 143; 77 v. 147, 151; 75 v. 564, § 4; S. & S. 402.)

Sec. 13180. Wrongful use of material purchased by contractor.

Whoever, being an owner, contractor or sub-contractor, with intent to defraud in purchasing materials on credit, represents that they are to be used in a designated building or other improvement, and thereafter uses or causes them to be used in the construction of a building or improvement other than that designated, without the written consent of the person of whom such materials were purchased, shall be fined not more than five hundred dollars. (R. S. § 3184c; 86 v. 374; 95 v. 210; 97 v. 499.)

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Sec. 13181. False quantities or estimates by engineer with intent to defraud; penalty.

Whoever, being a civil engineer, assistant engineer, architect, superintendent, or inspector on any improvement, whose duty it is to ascertain from actual measurement, quantities on which estimates or final estimates are to be made, knowingly gives other than the true quantities, for estimates, with intent to defraud the construction company, contractor, sub-contractor, laborer or person furnishing supplies or material, if the amount of the discrepancy at the contract price exceeds thirty-five dollars, shall be fined not less than the amount at contract price, of all work done or material furnished, and not included in his final estimate, or imprisoned in the penitentiary not less than one year nor more than five years. (86 v. 121, § 5; R. S. § 3231-5; 107 v. 181.)

Section 3231-1, et seq., to § 3231-5, et seq., providing for liens in favor of subcontractors, and § 3207, et seq., to § 3211, et seq., fixing the order of priority of such liens, are unconstitutional in that they interfere with the owner's liberty to contract, and abridge his power in that respect, and impose upon his property against his will a lien in favor of third persons who furnish labor or materials at the instance of a contractor for an improvement upon the land of such owner which is contrary to the arrangement between the owner and contractor with reference to payment of the contract price. Shaw & Co. v. Cleveland, C. C. & St. L. Ry., 8 O. L. R. 43.

Sec. 13181-1. Engineer, architect, superintendent, etc., giving false estimates; penalty.

Whoever, being a civil engineer, assistant engineer, architect, superintendent or inspector on any improvement, whose duty it is to ascertain from actual measurement quantities on which estimates or final estimates are to be made, knowingly gives other than the true quantities for estimates, with intent to defraud the owner, if the amount of the discrepancy at the contract price exceeds thirty-five dollars, shall be fined not less than the amount at contract price or imprisoned in the penitentiary not less than one year nor more than five years. (107 v. 181.)

Sec. 13182. Receiving money when bank insolvent.

Whoever, being connected with or serving a commercial bank, savings bank, safety deposit company, trust company, or a combination of two or more of such classes of business, receives, or, being an officer thereof, permits an employe to receive money, checks, drafts or other property as a deposit therein when he has knowledge that it is insolvent,

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shall be fined not more than five thousand dollars or imprisoned in the penitentiary not more than five years, or both. (99 v. 293, § 116.)

Sec. 13183. Unlawfully issuing certificate of deposit, etc.

Whoever, being an officer, employe, agent or director of a corporation incorporated and doing business as a commercial bank, savings bank, savings society, society for savings, savings and loan association, savings and trust company, safe deposit or trust company or other corporation or association, except building and loan association, having power to receive and receiving money on deposit, wilfully and fraudulently issues or puts forth a certificate of deposit, draws an order or bill of exchange, makes an acceptance, assigns a note, bond, draft, bill of exchange, mortgage, judgment or decree or makes a false entry in a book, report or statement of such corporation, shall be fined not more then ten thousand dollars or imprisoned in the penitentiary not more than thirty years, or both. (99 v. 278, § 44.)

Sec. 13184. Fictitiously borrowing, etc., money.

Whoever, being an officer, employe, agent or director of such corporation as provided in the next preceding section, fictitiously borrows or solicits, obtains or receives money for the corporation not in good faith intended to be and not the property of the corporation, with intent to defraud or injure the corporation or another corporation or person or to deceive an officer of the corporation or an agent appointed to examine the affairs of the corporation, or publishes a false statement or report relating to the financial condition of the corporation with intent to defraud or injure it or another corporation or person, shall be fined not more than ten thousand dollars or imprisoned in the penitentiary not more than thirty years, or both. (99 v. 278, § 44.)

Sec. 13185. Failing to charge certified check.

Whoever, being an officer or employe of a corporation conducting a commercial bank, savings bank, safe deposit company, trust company or two or more of such classes of business in accordance with the laws of this state, wilfully certifies a check drawn on such corporation and fails forthwith to charge the amount thereof against the account of the person, firm or corporation drawing it, shall be fined not more than five thousand dollars or imprisoned in the penitentiary not less than one year nor more than five years, or both. (99 v. 275, §§ 31, 33.)

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Sec. 13186. Certifying check when not sufficient funds.

Whoever, being an officer or employe of such corporation as provided in the next preceding section, wilfully certifies a check drawn upon the corporation unless the person, firm or corporation drawing it has on deposit with the corporation an amount of money subject to the payment of such check and equal to the amount specified therein, shall be fined not more than five thousand dollars or imprisoned not less than one year nor more than five years, or both. A check so certified by an authorized officer thereof shall be a good and valid obligation against the corporation. (99 v. 275, §§ 32, 33.)

Sec. 13187. Resorting to unlawful device.

Whoever, being an officer or employe of such corporation as provided in section thirteen thousand one hundred and eighty-five, resorts to a device, receives a fictitious obligation in order to evade the provisions of this section and the next two preceding sections, or certifies a check before the amount thereof has been regularly entered to the credit of the drawer thereof upon the books of such corporation, shall be fined not more than five thousand dollars or imprisoned not less than one year nor more than five years, or both. (99 v. 275, § 33.)

Sec. 13188. Signing name to order without authority.

Whoever, being a president, director, trustee, member of a committee, secretary, treasurer, attorney or other officer or agent of a building and loan association or savings association, as provided by law, signs the name of a person to an order or warrant for the payment of money without proper power of attorney or written order from the person to whose order such order or warrant is made payable, shall be imprisoned not less than one year nor more than ten years. (99 v. 536, § 46.)

Sec. 13189. Declaring dividend greater than earned.

Whoever, being a member of a board of directors of a building and loan association or savings association, as provided by law, votes to declare, or, being a financial or first secretary thereof, declares or advises the board of directors thereof to declare a greater dividend than has been actually earned by such association, for the purpose of deceiving the people or defrauding the members thereof, shall be imprisoned not less than one year nor more than ten years. (99 v. 536, § 46.)

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Sec. 13190. False entry in book, etc.

Whoever, being a member of a board of directors of a building and loan association or savings association, as provided by law, certifies to, or makes a false entry on a book, report or statement of or to such association, with intent to deceive, injure or defraud it or another company, body politic or corporate or person, or to deceive any one appointed to examine the affairs of such association, shall be imprisoned not less than one year nor more than ten years. (99 v. 536 § 46.)

Sec. 13191. Aiding officer to violate preceding section.

Whoever, with intent to deceive, injure or defraud a building and loan association or savings association, as provided by law, or other company, body politic or corporate or person, aids or abets a president, secretary, treasurer, committee or other person in violation of any of the next four preceding sections shall be imprisoned not less than one year nor more than ten years. (99 v. 536, § 46.)

Sec. 13192. Failing to make reports, etc.

Whoever, being an officer thereof, fails to make the reports required of him by the laws provided for the organization, regulation and inspection of building and loan associations and savings associations, or, being an officer, employe or other person, solicits business for, aids or assists such association to do business contrary to the provisions of such laws, or without having complied therewith, shall be fined not more than five hundred dollars or imprisoned not more than six months, or both. (99 v. 536, § 46.)

Sec. 13193. Liability on bond.

Whoever violates any provision of the next five preceding sections shall be liable to the person injured thereby to the extent of the damage incurred and suit may be brought against the person so violating and the sureties on the bond given by him to such association for the faithful performance of his duty. Fines collected under the next five preceding sections shall be paid into the state treasury. (99 v. 536, § 46.)

Sec. 13193-1. Penalty for giving with intent to defraud, check, draft or order.

Any person who, with intent to defraud, shall make or draw or utter or deliver any check, draft or order for the payment of money upon any bank or other depositary, who never had any funds or credit

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with such bank or depositary, shall be guilty of a felony, and upon conviction thereof shall be fined not less than fifty dollars and not more than two hundred dollars, or imprisoned in the Ohio state penitentiary for not less than one year nor more than three years or both. The word "credit" as used herein shall be construed to mean any contract or agreement with the bank or depositary for the payment of such check, draft or order, when presented. (106 v. 443.)

FORM OF CHARGE.

At the county of ——— and State of Ohio, on the ——— day of ———, 19—, one E F, with intent to defraud, unlawfully and knowingly did falsely draw, utter and deliver to one M N a certain check for the payment of money, which said check is of the purport and value following (here set forth copy of check or a full description of same), well knowing that he, the said E F, never had any funds or credit with the said bank, with intent then and there to defraud the said M N.

(Sec. 13193-2.) Sec. 13194. Defining fraudulent advertising.

Whoever, with intent to sell, or in any wise dispose of merchandise, securities, service, or anything offered by him, directly or indirectly, to the public for sale or distribution, or with intent to increase the consumption thereof, or to induce the public in any manner to enter into any obligation relating thereto, or to acquire title thereto, or an interest therein, causes, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public, in this state, in a newspaper or other publication, or in the form of a book, notice, handbill, poster, bill, circular, pamphlet or letter, or in any other way, an advertisement of any sort regarding merchandise, securities, service, or anything so offered to the public, which advertisement contains any assertion, representation or statement of fact which is untrue, or deceptive, shall be guilty of a misdemeanor and on conviction thereof shall be punished by a fine of not less than ten dollars nor more than one hundred dollars or by imprisonment in the county jail not exceeding twenty days or by both said fine and imprisonment. (103 v. 43, § 1.)

Note: The above section was given a wrong numbering, and the proper numbering should have been § 13193-2.

This section, providing against fraudulent advertising, is free from constitutional objection and a valid exercise of the police power, finding ample justification in changed conditions which have given to advertising a large place in trade and every day life. State v. Schaengold, 13 O. L. R. 130.

FORM OF CHARGE.

On or about the ——— day of ———, 19—, at the county of ——— and State of Ohio, unlawfully, knowingly and with intent to sell and dispose of certain merchandise, to-wit: (here describe it such as clothing, etc.), did cause to be made, published, circulated and placed before the public in a certain newspaper, to-wit: (name the newspaper) a certain advertisement containing an assertion, representation and statement of fact which was untrue and deceptive in this (here set forth the part of the advertisement that is untrue), which said statement of fact and representation was untrue and deceptive.

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CHAPTER XVII.

OFFENSES RELATING TO INTOXICATING LIQUORS.

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Sec. 13194. Being found intoxicated.

Whoever is found in a state of intoxication shall be fined five dollars. (R. S. § 6940; 56 v. 173, § 5; S. & C. 1432.)

Where one is found in a state of intoxication within the limits of a municipality, the mayor thereof has authority to arrest him without a warrant or the filing of an affidavit charging said offense. Garrison v. Bricker, 7 O. L. R. 337.

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The degree of intoxication contemplated by the statute providing a penalty therefor is not established by proof of a flushed face, or the smell of liquor on the breath, or a disposition to talk freely or loudly, but refers rather to a condition in which control has been lost either of the faculties or the muscles of locomotion. Gard v. State, 15 C. C. (N.S.) 255, 23 O. C. D. 632.

An intoxicated person is not liable for an injury caused by the negligent driving of a horse and buggy by a drunken companion with whom he had spent the day riding and drinking. They are not engaged in a joint undertaking. Flandermyer v. Urbanowitz, 21 C. C. (N.S.) 128 (affirmed, 79 O. S. 450).

Drunkenness is not a crime involving moral turpitude or infamous punishment, and charging that A "is in the station house" and "that he got drunk, fell off the street car and was arrested," is not actionable per se. Landis v. Caylor, 5 N. P. 216, 7 O. D. 280.

FORM OF CHARGE.

Getting intoxicated.

Did unlawfully get intoxicated, by drinking a certain intoxicating liquor, called ———; or, by drinking a certain intoxicating liquor, the more particular name and description of which is to the jurors aforesaid unknown, and the said E F was then and there found in a state of intoxication.

Sec. 13195. Keeping place where intoxicating liquors are sold in violation of law.

Whoever keeps a place where intoxicating liquors are sold, furnished or given away in violation of law, shall be fined not less than one hundred dollars nor more than five hundred dollars, and, for each subsequent offense shall be fined not less than two hundred dollars nor more than five hundred dollars. The court, on conviction for a second or subsequent offense, shall order the place where such liquor is sold, furnished or given away in violation of law, to be abated as a nuisance, or shall order the person convicted for such offense to give bond payable to the State of Ohio in the sum of one thousand dollars, with sureties to the acceptance of the court, that such person will not sell, furnish or give away intoxicating liquor in violation of law, and will pay all fines, costs and damages assessed against him for violation of the laws relating to the sale of intoxicating liquors. The giving away of intoxicating liquors, or other shift or device to evade the provisions of this section, shall be unlawful selling. (R. S. § 6942; 99 v. 470; 92 v. 55; 52 v. 153, §§ 4, 8, 9; S. & C. 1431, 1433.)

Keeper.—To convict for violation of § 4 of the act of 1854 (4 Curwen, 2669), the proof must show that it was a place where liquors were habitually sold in violation of the act. A single sale does not make the sale a nuisance, or the seller a "keeper," within the meaning of the act. A series of sales is necessary. Miller v. State, 3 O. S. 475.

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The word "keeper" of a room or place of public resort, for the unlawful sale of intoxicating liquors, does not exclusively mean the owner of the room, nor of the liquors sold; but, while such owner may be included, it also embraces any one who, though not the owner, has the possession of both the room and the liquors, which, together with the unlawful business, are under his care and subject to his management and control. Schultz v. State, 32 O. S. 276.

Place.—To convict for a violation of § 4 of the act of 1854 (4 Curwen, 2669), it is necessary to aver in the information, and prove on the trial, that the place where the liquor was sold was a place of public resort. Miller v. State, 3 O. S. 475.

An information upon § 4 of the act to provide against the evils resulting from the sale of intoxicating liquors, passed May 1, 1854 (4 Curwen, 2669), is defective, if it does not show that the place where the liquor was sold was a place of public resort. This fact is sufficiently shown if the place is described as either a tavern, eating-house, bazaar, restaurant, grocery or coffee-house, because each of these names is used in the act, and each of them does, *ex vi termini*, import a place of public resort. But it is otherwise if the place is merely called a "room;" for, although that word is also used in the act, it does not, *ex vi termini*, describe a place of public resort, and that it is so must be averred. Aultfather v. State, 4 O. S. 467.

The gist of the offense defined by § 4 of the act of May 1, 1854, to provide against the evils resulting from the sale of intoxicating liquors, is the keeping of a place of public resort where intoxicating liquors are sold in violation of law, and not that the place kept is otherwise of any particular description. O'Keefe v. State, 24 O. S. 175.

Where the place alleged to have been kept by the accused is described as a room, no case of variance is presented, although the proof given in support of the charge shows that the room kept was a cellar or a grocery. O'Keefe v. State, 24 O. S. 175.

The offense defined in this section consists in the keeping of a place where the business of the unlawful sale of liquor is carried on; and the section is not unconstitutional in not requiring such place to be one of public resort. Oshe v. State, 37 O. S. 494.

To constitute an unlawful sale of intoxicating liquor under the first section of the act of May 1, 1854 (S. & C. 1431), it is not necessary that the premises on which the sale is made should be a place of public resort; and an indictment which charges that the accused "did unlawfully sell intoxicating liquors to" a person named, "to be drank upon the premises where sold," sufficiently describes the offense. Picket v. State, 22 O. S. 405.

Proof of a single sale on Sunday of intoxicating liquors in a room furnished with bar fixtures, a bartender and other indicia of a place where liquors are kept, justifies a conviction under this section for keeping a place where intoxicating liquors are sold contrary to law. Sanders v. State, 1 O. A. R. 306, 20 C. C. (N.S.) 395, 24 O. C. D. 226.

Proof of one unlawful sale is sufficient to sustain a conviction under this section; and the affidavit need only aver an unlawful sale, leaving it to be developed by the evidence in what respect the sale was unlawful. Lynch v. State, 12 C. C. (N.S.) 330, 21 O. C. D. 352 (affirmed, 81 O. S. 489).

Where a person makes a return that his business is confined to malt or vinous liquors, and thereafter during the assessment year makes a single sale of any other

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intoxicating liquor, the assessment upon his business is increased under § 5 of the Dow law, passed May 14, 1886 (83 O. L. 157). Simpson v. Serviss, 3 C. C. 433, 2 O. C. D. 246.

Intoxicating liquors.—An indictment under § 4 of the act of May 1, 1854 (S. & C. 1431), to provide against the evils resulting from the sale of intoxicating liquors, is not supported by proof that the accused kept a place of public resort, where ale was sold in violation of law, the terms "intoxicating liquors" in § 4 being, by the proviso contained in § 8 of the act, limited to intoxicating liquors other than "wine manufactured of the pure juice of the grape cultivated in this state, beer, ale, and cider." Johnson v. State, 23 O. S. 556.

Under former exceptions to this section the sales of native wine, beer, ale and cider were exempt from its inhibitions. Johnson v. State, 23 O. S. 556.

Strong beer is intoxicating liquor. Markle v. Akron, 14 O. 587.

The fact that the preparation contained whiskey does not necessarily make it an intoxicating liquor, but when it is mixed with other drugs, it must be proved that its intoxicating qualities remain. State v. Chambers, 2 Dec. Rep. 647, 4 W. L. M. 275.

In violation of law.—If the indictment contains counts charging offenses under the first section of the act "to provide against the evils resulting from the sale of intoxicating liquors in the State of Ohio" (2 S. & C. 1431), followed by a count charging an offense under the fourth section, in its evidence to sustain the latter counts the state is not restricted to evidence relating to the specific charges set forth in the prior counts. State v. Conner, 30 O. S. 405.

Where the indictment alleges that the unlawful sales were made in violation of a certain section of the Revised Statutes, under it no sales can be proved that are not within the inhibition of the section. Oshe v. State, 37 O. S. 494.

A father who is the proprietor of a place where intoxicating liquors are sold may be convicted upon proof of an unlawful sale by his son as his agent, but the authority of the son to make such sale must be proved, although it is not necessary for it to be averred. Parker v. State, 4 O. S. 565.

A husband may be convicted under this section, although he sold the liquor as agent for his wife. Schultz v. State, 32 O. S. 276.

Where the sale was made by an agent of the defendant in charge of the establishment where the liquor was sold, to rebut the presumption of prima facie agency, the defendant may show that the sale was in fact made without his authority and against his directions. The directions to the agent forbidding the sale must be in good faith, and not merely colorable. Anderson v. State, 22 O. S. 305.

A barkeeper can not be prosecuted under this section if it appears that the owner of the place was in control and present and that the barkeeper was subject to his direction. State v. Berry, 13 C. C. (N.S.) 206, 22 O. C. D. 250.

A whiskey broker who negotiates the sales of liquor between large dealers is not within the provisions of the Dow law. Voss v. Hagerty, 11 Dec. Rep. 408, 26 Bull. 268.

All who aid or participate in the unlawful sale of intoxicating liquors, or other misdemeanor, are guilty as principals. State v. Munson, 25 O. S. 381.

The administering of liquors as a medicine to a patient by a physician can not be properly denominated a sale. Schaffner v. State, 8 O. S. 642.

Whether giving away liquor by the proprietor of a grocery store in order to increase his trade is a selling in violation of a former statute is a question for the jury. Kober v. State, 10 O. S. 444.

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On the trial of an indictment for the unlawful sale of intoxicating liquors, the accused may show that at the time he bought the article, alleged in the indictment to be intoxicating liquor, it was represented to him to be free from alcoholic properties; that he bought it with the understanding and believing that it was not intoxicating liquor, and sold it with such understanding and belief. Farrell v. State, 32 O. S. 456.

It must be shown that the liquor was intoxicating and that the defendant knew it. State v. Chambers, 2 Dec. Rep. 647, 4 W. L. M. 275.

Actual knowledge of unlawful sales of liquor is unnecessary on the part of the keeper of the premises where such sales are made by one placed by him in charge of the premises. State v. Fuller, 13 C. C. (N.S.) 405.

Common nuisance.—Under an indictment for keeping a place, etc., it is not necessary to show that the nuisance existed at the time proceedings were commenced. It will be sufficient to show that it existed, in fact, at some time during the period named in the indictment. Clinton v. State, 33 O. S. 27.

Order of abatement.—No order to shut up or abate the place can rightfully be made, unless the nuisance continues to exist at the time such order is made. Unless, therefore, the court is satisfied that at the time of making the order, the place is kept for the sale of liquors in violation of the act, no order should be made. For it is the unlawful business (and not the place, per se) that creates the nuisance; and, hence, where the business has ceased, there is no nuisance to abate. No man's property can be forfeited as a punishment for crime, the constitution providing that no conviction shall work a "forfeiture of estate." (Art. I, § 12.) Hence, there is no power to deprive a man of the use of his property, unless it be necessary in order to abate an existing nuisance. The order is not to be directed to any officer. It is not an order to be executed by an officer. It is an order to the person convicted, obedience to which may be enforced, if the nuisance be continued, by attachment for contempt of court. The order being made, if the convict cease to keep a house of public resort of the character named or referred to in the fourth section, he need give no bond, and having so ceased, no attachment can properly be issued against him. But if he desire to continue keeping such house of public resort, he must, in order to avoid an attachment, give bond. He has his election, to quit keeping a house of public resort, or to give bond, and keep it without violating the law. Miller v. State, 3 O. S. 475.

The order of court, to abate the room or place as a public nuisance, on conviction of the keeper thereof, is not an order to be directed to or executed by any officer; but it must be an order to the person convicted, obedience to which may be enforced, if the nuisance be continued by attachment for contempt of court. Schultz v. State, 32 O. S. 277.

A conviction for keeping a place where intoxicating liquors are sold in violation of law between designated days in 1879, and a judgment that such place is a common nuisance, constitute no bar to an indictment for keeping such place between designated days in 1880, although the order under the first conviction, that the defendants shut up and abate the nuisance, was not obeyed or enforced. Gormley v. State, 37 O. S. 120.

The court has no power to order the accused to be confined in the workhouse until he enters into the bond required by statute; but the court should order that in default of such bond the place where such liquor is sold, furnished, or given away, in violation of law, should be abated as a nuisance, within a day named by the court. Morrison v. State, 87 O. S. 506.

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Punishment for the criminal act of creating such a nuisance as provided in this section is personal, and abatement of the nuisance by the defendant will not relieve him from the liability for the criminal act committed. Clinton v. State, 33 O. S. 27.

Where, on conviction of a violation of this section, the court orders the place to be shut up and abated as a common nuisance, the keeper of such place is entitled under said section to the privilege of giving the bond provided for therein, for the purpose of avoiding the enforcement of the order of abatement. Weaver v. State, 74 O. S. 53.

Proviso.—That clause of R. S. § 6942 which provides that "the provisions of the last section, concerning the sale of intoxicating liquors to be drunk where sold, and this section, do not extend to the sale of wine manufactured from the pure juice of the grape cultivated within this state," is not in conflict with § 8, Art. I, of the constitution of the United States, which gives to congress the exclusive power "to regulate commerce with foreign nations and among the several states, and the Indian tribes." McGuire v. State, 42 O. S. 530.

Shift or device.—It is error for the court, upon the trial of an indictment under § 4 of the act of May 1, 1854, "to provide against the evils resulting from the sale of intoxicating liquors in the State of Ohio" (S. & C. 1431), to charge the jury that if they find that the defendant "gave away the liquor with intent to increase the number of his customers at his grocerystore, and which resulted in no way favorable to the defendant, except in the increased quantity of goods sold, it would be within the provisions of the liquor law, and a selling in violation of law." This was charging as matter of law what should have been left to the jury as matter of fact. It was the province of the jury to find whether or not the giving away the liquor by the defendant, "with an intent to increase the number of his customers at his grocerystore," was a shift or device to evade the provisions of said act, within the meaning of § 9 thereof. Kober v. State, 10 O. S. 444.

Procedure.—In an indictment for the violation of § 1 of the act of May 1, 1854, "to provide against the evils resulting from the sale of intoxicating liquors in the State of Ohio," it is not necessary to a perfect description of the offense, as defined in § 1, that the indictment should contain an averment that the liquor was not "wine manufactured of the pure juice of the grape, cultivated in the State of Ohio, or beer, ale, or cider," as specified in the proviso at the end of § 8 of said act. That proviso forms no part of the description of the offense of violating said § 1, being contained in a distinct section of the act fixing the penalty for such offense; and the benefits of said proviso must be taken advantage of by the accused in making his defense upon the facts. Becker v. State, 8 O. S. 391.

In an indictment under this section, it is a sufficient description of the unlawful sales to aver that they were made "in violation of R. S. § 6941 of Ohio;" and the reference to the section must be understood as referring to the section then in force. Oshe v. State, 37 O. S. 494.

Where the first count of an indictment charges the defendant with keeping a place where intoxicating liquors are "kept for sale, given away, or furnished for beverage purposes," in violation of R. S. § 4364-20b (G. C. § 13232), and the second count charges him with keeping a place where intoxicating liquors are sold in violation of R. S. § 6942 (G. C. § 13195), each count covering the same period of time, and the evidence at the trial establishes the fact that during all such period, the defendant was the keeper of but one place where intoxicating liquors

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were sold, there is but one offense, and it is error for the court, on a verdict of guilty under each count, to inflict the penalties prescribed by each of said sections. Weaver v. State, 74 O. S. 53.

Where on conviction of keeping a place where intoxicating liquors are sold in violation of R. S. § 6942 (G. C. § 13195), the court orders the place to be shut up and abated as a common nuisance, the keeper of such place is entitled under said section to the privilege of giving the bond provided for therein, for the purpose of avoiding the enforcement of the order of abatement. Weaver v. State, 74 O. S. 53.

In prosecutions begun in the probate court, under favor of G. C. §§ 13195 and 13225, information must be filed by the prosecuting attorney in accordance with G. C. § 13441 before the probate court has jurisdiction to try such prosecutions. Rogers v. State, 87 O. S. 308 (reversing 22 O. C. D. 389).

In a prosecution for the violation of the liquor laws, an affidavit is not bad for duplicity which charges not only that the accused kept and used a wagon for the selling, furnishing and giving away of intoxicating liquors as a beverage, but also that from it he sold, furnished and gave away such liquors.

It is no objection to the introduction of evidence in a prosecution for the violation of the liquor laws, that such evidence was unlawfully obtained under the search and seizure law. Cohen v. State, 16 C. C. (N.S.) 178.

An information under § 6942 (G. C. § 13195), will not lie against a barkeeper for keeping a place where intoxicating liquors are sold in violation of law, if it appears that the owner of the place was in control and present and the barkeeper was without authority and subject to the direction of the owner. State v. Berry, 13 C. C. (N.S.) 206, 22 O. C. D. 250.

The purpose of such an ordinance must be held to be to prohibit a continuance of the business of the saloon between the hours named, and conviction can not be had of a saloon keeper, who closed his saloon before 10 p. m., but remained in the saloon with his barkeeper for twenty-five minutes after 10 for the purpose of counting the receipts of the day. Dunkle v. Junction City, 2 O. A. R. 473, 21 C. C. (N.S.) 253.

Demurrer lies to an indictment for perjury on the part of a witness who falsely stated before the grand jury that he did not know the identity of the person who handed him a bottle of beer, when there is no allegation in the indictment that the alleged offense occurred in a district in which it was contrary to law to sell or give away beer or other intoxicating liquor. State v. Hill, 9 O. L. R. 272.

The introduction of a record tending to show that the defendant paid the United States internal revenue tax for the sale of intoxicating liquors within the county, affords prima facie evidence of guilt of the offense charged, and if left unexplained, or if no evidence is introduced to the contrary would justify a jury in returning a verdict of guilty. State v. Verb, 9 O. L. R. 584, 57 Bull. 75.

In order to sustain an indictment charging the keeping of a place in "dry territory" where intoxicating liquors are sold, furnished or given away for use as a beverage, the testimony must establish beyond a reasonable doubt that the keeping of such a place has been prohibited within the territory in question, that the defendant kept such a place and with the purpose charged, and that the alleged offense was committed at the time stated in the indictment. State v. Verb, 9 O. L. R. 584, 57 Bull. 75.

Alleging a room as the place where intoxicating liquors were unlawfully sold, and proving a cellar or a grocery is not a material variance. O'Keefe v. State, 24 O. S. 175.

Where an indictment alleges the sale to have been made at the grocery of M, in the township of A, and the only proof is of a sale at the grocery of M, in the township of G, the variance between the allegation and the proof is fatal to the prosecution, since the place was averred by way of local description, and not a mere venue. Moore v. State, 12 O. S. 387.

Under an indictment for keeping a place, etc., it is not necessary to show that the nuisance existed at the time proceedings were commenced. It will be sufficient to show that it existed, in fact, at some time during the period named in the indictment. Clinton v. State, 33 O. S. 27.

On an indictment charging two persons with the commission of a joint offense, both can not be convicted on evidence that each one committed an act

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constituting an offense similar to the act charged in the indictment. Stephens v. State, 14 O. 386.

Where the defense is proffered in a trial on the charge of making sales of intoxicating liquor in "dry" territory, that the sales were made on the prescription of a physician, it is not error to hear testimony as to the reputation of a physician as bearing on the question of good faith in the issuing of such prescriptions. Rogers v. State, 14 C. C. (N.S.) 177, 22 O. C. D. 389 (reversed, Rogers v. State, 87 O. S. 308).

An indictment charging the unlawful sale of intoxicating liquors to "divers persons whose names were to the grand jurors unknown" is sufficient, and is not bad for duplicity, for it may mean a joint sale and thus a single transaction. Gordon v. State, 46 O. S. 607; Nickel v. State, 6 C. C. 601, 3 O. C. D. 605.

Where a single sale is charged in the indictment and several are proved, the prosecutor may be required to elect upon what particular transaction he relies for conviction. Nickel v. State, 6 C. C. 601, 3 O. C. D. 605.

In an indictment for selling intoxicating liquors in violation of law, the time of the alleged offense is immaterial, and proof of a number of sales about the time alleged in the indictment and prior to the finding thereof, is sufficient to warrant conviction. Koch v. State, 32 O. S. 353.

An indictment charging the keeping of a place where intoxicating liquors were sold, furnished or given away on a designated day is sufficient, and it is not necessary to state the dates from which and to which the defendant was keeping a place where liquors were sold in violation of the law. Lynch v. State, 12 C. C. (N.S.) 330, 21 O. C. D. 352 (affirmed, without report, 81 O. S. 489).

In a prosecution for keeping a place where intoxicating liquors were sold in "dry" territory, the certificate showing the result of the local option election previously held, is admissible, and does not violate the provisions of the bill of rights giving an accused person the right to confront the witness against him. State v. Berry, 13 C. C. (N.S.) 206, 22 O. C. D. 250.

The mayor of a village has jurisdiction in case of an alleged illegal keeping of a place for the sale of intoxicating liquor in a municipality located in the same county. Lynch v. State, 16 N. P. (N.S.) 167.

Plea of former jeopardy is properly heard and determined by a mayor under G. C. § 4528, in a prosecution for unlawfully keeping a place for sale of intoxicating liquors contrary to this section, and, since the prosecution is for a fine only, a jury trial is not necessary. Sanders v. State, 1 O. A. R. 306, 20 C. C. (N.S.) 395, 24 O. C. D. 226.

For material variance, see G. C. § 13582.

General Code § 13588 provides that an indictment for violation of this section need not allege the kind of liquor sold, nor describe the place where sold.

General Code § 13589 provides that in an indictment for violation of this section, the name of the persons to whom the liquor is sold need not be alleged.

Time of offense.—An affidavit charging the keeping of a place where intoxicating liquors were sold, furnished or given away on a designated day, is sufficient to sustain a prosecution under the Rose county local option law. Lynch v. State, 12 C. C. (N.S.) 330 (case affirmed, no report, 81 O. S. 489).

Unlawful sale.—An affidavit charging the keeping of a place where intoxicating liquors are sold need go no further than to aver an unlawful sale, leaving it to be developed by the evidence in what respect the sale was unlawful. Lynch v. State, 12 C. C. (N.S.) 330 (case affirmed, no report, 81 O. S. 489).

FORM OF BOND.

Bond to prevent violation of § 13195, Gen'l Code.

Know all men by these presents, that ———, as principal, and ———, as sureties, are held and firmly bound unto the State of Ohio in the penal sum of one thousand dollars, to the payment of which for the use of ——— county, we hereby jointly and severally bind ourselves, our heirs, executors and administrators firmly by these presents.

Signed by us at ———, Ohio, this ——— day of ———, A. D. 19—.

The condition of the above obligation is such that whereas the above bound ——— was on the ——— day of ———, 19—, in the ——— court of the ——— (here insert "village" or "township") of ——— county, Ohio, adjudged to be guilty of violating G. C. § 13195 and,

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Whereas, said violation was a subsequent offense to the previous violation of said § 13195 in which said defendant had theretofore been adjudged guilty.

Now, if the said ——— will not sell, furnish or give away any intoxicating liquor as a beverage in violation of any law prohibiting or regulating the sale of intoxicating liquor as a beverage then these presents shall be void, otherwise to remain in full force and effect. ———.

———.

The above bond and sureties thereon taken and approved by me this ——— day of ———, 19—. ———,

———.

FORMS OF CHARGES.

Keeping a public room or building for the sale of liquors, contrary to law.

That on the ——— day of ———, in the year of our Lord one thousand nine hundred and ———, and from that day until the commencement of the proceedings herein, to-wit: on the ——— day of ———, in the year aforesaid, at the said county of ———, in the said State of Ohio, one E F was, and has been, unlawfully, the keeper of a place where intoxicating liquors were and have been then and there sold by the said E F, in violation of the acts of the general assembly of the State of Ohio in reference to the sale of intoxicating liquors in the State of Ohio, passed by the said general assembly, to the common nuisance of the citizens and people of the State of Ohio.

Affidavit before a magistrate keeping a place unlawfully.

State of Ohio, ——— county, ss.:

Before me, ———, mayor of the village of ———, county of ———, State of Ohio, personally came ———, who being duly sworn according to law, deposes and says:

That on or about the ——— day of ———, A. D. 19—, in the city of ———, State of ———, county of ———, one ———, was then and there the unlawful keeper of a place where intoxicating liquors were then and there sold by the said ———, in violation of the acts of the General Assembly of the State of Ohio with reference to the sale of intoxicating liquors in the State of Ohio to the common nuisance of the citizens and people of said State of Ohio, contrary to § 13195 of the General Code and against the peace and dignity of the State of Ohio.

Selling unlawfully.

That on or about the ——— day of ———, A. D. 19—, in the county of ———, Sate of Ohio, one ——— did then and there sell intoxicating liquors as a beverage to one ———. That the selling of intoxicating liquors as aforesaid by the said ——— was then and there prohibited and unlawful and contrary to § 13195 of the General Code, and against the peace and dignity of the State of Ohio.

Sec. 13196. Drinking intoxicants aboard trains.

Whoever drinks whisky, beer, ale or other intoxicating beverage while aboard an engine or car propelled by steam or electricity, except

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in a dining, cafe or other car with buffet or cafe attachment, shall be fined not less than five dollars nor more than one hundred dollars for each offense. (99 v. 12, 13 §§ 1, 2.)

Sec. 13197. No intoxicating liquors sold on election days, and drinking places closed.

Whoever sells or gives away, spirituous, vinous or malt liquors on an election day, or, being the keeper of a place where such liquors are habitually sold and drank, fails, on an election day, to keep it closed, shall be fined not more than one hundred dollars and imprisoned not more than ten days. (R. S. § 6948; 61 v. 24; S. & S. 344.)

Election day.—The "election day" mentioned in § 6948, Revised Statutes, is a whole day of twenty-four hours; and the keeper of a place where spirituous, vinous or malt liquors are habitually sold and drank, is required to keep such place closed during the whole twenty-four hours of the day of any election. Schuck v. State, 50 O. S. 493.

Indictment.—In an information charging a violation of the act making it an offense to keep open on election day a place where on other days spirituous, vinous, or malt liquors are habitually sold and drank, it is not sufficient to describe the place as one "where intoxicating liquors were on other days habitually, sold and drank." Weisbrodt v. State, 50 O. S. 192.

It is not necessary to allege in such information the filing of an affidavit charging the offense. Weisbrodt v. State, 50 O. S. 192.

FORM OF CHARGE.

Selling liquor on election day.

Did unlawfully sell spirituous liquors to one C D, said ——— day of ———, A. D. 19—, being the day on which a certain election (describe the election) was held, said election being duly authorized by law, as he, the said E F, then and there well knew.

Sec. 13198. Furnishing liquor to a person intoxicated, etc.

Whoever buys intoxicating liquor for, or sells, or furnishes it to, a person who is intoxicated or in the habit of getting intoxicated, unless given by a physician in the regular line of his practice, shall be fined not less than ten dollars nor more than one hundred dollars, or imprisoned not less than ten days nor more than thirty days, or both. (R. S. § 6943; 83 v. 161, § 12; 63 v. 149, §§ 1, 2; S. & C. 748; 102 v. 116.)

See decisions under § 13195.

Sale.—In a trial upon an information under § 4 of the "act to provide against the evils resulting from the sale of intoxicating liquors in the State of Ohio" (2 S. & C. 1431), proof was given that a sale was made to a person in

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the habit of getting intoxicated, but under circumstances tending to show that the liquor was obtained under false pretenses, etc. *Held*, that it is error to charge the jury that if the defendant was induced to sell the liquor to such person, under an imposition practiced upon the defendant, so that the defendant had no intention to violate the law, he must, notwithstanding, be held to have sold to such person at his peril, and must be deemed guilty under the statute. Miller v. State, 5 O. S. 275.

Where the testimony shows that the liquor was sold in the house of the defendant, and at his bar, by his son, in the absence of the defendant, without any other evidence of the agency, it is error in a court to charge that such testimony makes *prima facie* case of authority, from the defendant to the son, to do an illegal act. Parker v. State, 4 O. S. 563.

The act to restrain the sale of spirituous liquors, passed March 12, 1851, which immediately preceded the act of May 1, 1854 (S. & C. 1431), and was repealed by it, excepted from its operation sales made for "medical and pharmaceutical purposes," but this act makes no such exceptions; and from this circumstance, and from the fact that the exception was liable to much practical abuse, it is presumable that the legislature intended to exclude such exception. Any person may lawfully, in good faith, give away intoxicating liquors for medicinal or other purposes, or may lawfully sell them in any quantity for such purposes, to be drank elsewhere than where sold; but he cannot lawfully sell them (except such as are specially excepted by the statute) to be drank where sold, for any purpose. The administering of liquors, as a medicine, by a physician to a patient, could not properly be denominated a sale. Shaffner v. State, 8 O. S. 642.

Where, in a prosecution for unlawfully selling intoxicating liquor, it appears by the evidence for the state that the sale was made by the agent of the defendant, in charge of the establishment where the liquor was sold, it is competent for the defendant to rebut the presumption of *prima facie* agency which the evidence makes against him, by showing that the sale was in fact made without his authority and against his directions. But the directions to the agent, forbidding the sale, must be in good faith, for, however notorious or formal they may be, they can have no effect if they are merely colorable. The fact of agency is to be determined by the real understanding between the principal and agent. Anderson v. State, 22 O. S. 305.

It is not a crime to sell whiskey to one known to be in the habit of getting intoxicated where such sale is made in good faith for medicinal purposes. State v. Clemens, 3 Dec. Rep. 258, 5 Gaz. 165.

The statement of a physician, who was in the habit of getting intoxicated, made at the times of his purchases of liquor, that he wanted it for a patient and for medicinal purposes, does not, in the absence of proof to the contrary, raise the presumption that it is a sale to the patient. Boyd v. Watt, 27 O. S. 259.

Procedure.—A person indicted for selling intoxicating liquors, in violation of this section, may, on the trial, show that at the time he bought the article alleged in the indictment to be intoxicating liquor, it was represented to him to be free from alcoholic properties; that he bought it with the understanding, and believed, that it was not intoxicating liquors, and sold it with such understanding and belief. Farrell v. State, 32 O. S. 456.

A count in an information, charging B with selling intoxicating liquors to be drank at the place where sold, will be sustained by proof that the liquor was sold by C, as the agent of B, and it is not necessary to aver, in the information, that it was sold by an agent. Parker v. State, 4 O. S. 563.

S & E were indicted under the act of 1831 (3 Curwen, 2426, § 15), which provides "that if any person shall * * * vend or sell * * * spirituous liquors by less quantity than one quart, without being duly licensed, * * * every person

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so offending shall forfeit," etc. The indictment charged S & E with a joint sale. The court charged the jury that if the evidence showed that the defendants had separately been guilty of the offense charged, though it did not show that they were both engaged in the same act, they might be convicted. Held, that this was error. The indictment charged a joint sale, and the proof must correspond with it. Stevens v. State, 14 O. 386.

In an indictment for selling intoxicating liquors in violation of law, the time of the alleged offense is immaterial, and proof of a number of sales about the time alleged in the indictment, and prior to the finding thereof, is sufficient to warrant conviction. Koch v. State, 32 O. S. 353.

To convict a defendant of selling intoxicating liquors to a person intoxicated or in the habit of getting intoxicated, it is necessary to prove that the seller knew the buyer to be intoxicated, or in the habit of getting intoxicated. Miller & Gibson v. State, 3 O. S. 475; Aultfather v. State, 4 O. S. 467.

Evidence having been given, tending to prove that the person to whom intoxicating liquor was sold was in the habit of getting intoxicated, and that he resided in the neighborhood of the vendor, it is competent to give his general reputation in that behalf in evidence, as a circumstance tending to prove the vendor's knowledge of such habit. Adams v. State, 25 O. S. 584.

In prosecutions under this section, defendant may show, by his own or other persons' testimony, that, shortly prior to the time of the alleged unlawful sale, he made inquiry of persons well acquainted with the person charged in the indictment as a person in the habit of getting intoxicated, whether he was a person in the habit of getting intoxicated; and also show what information he obtained from such persons; his good faith and due care in seeking and obtaining such information, as well as the proper effect thereof, is to be left to the jury under all the circumstances. Crabtree v. State, 30 O. S. 382.

Where, on the trial of an indictment under this section, the state has offered evidence tending to prove several distinct substantive offenses, either of which, when duly proved, would warrant conviction, it is the duty of the court, upon motion, to require the prosecutor, before the defendant is put on his defense, to elect upon what particular transaction he will rely for a conviction. Stockwell v. State, 27 O. S. 563.

A count in an information charging B with selling intoxicating liquor to one "being then and there intoxicated and in the habit of getting intoxicated," is not bad for duplicity. Limber v. State, 9 C. C. (N.S.) 177, 18 O. C. D. 761.

FORMS OF CHARGES.

Buying for a person in the habit of getting intoxicated.

Did unlawfully buy from one C D, intoxicating liquors for one M N, the said M N being then and there a person in the habit of getting intoxicated, as he, the said E F, then and there well knew; said intoxicating liquors, bought of the said C D for the said M N, by the said E F, as aforesaid, not being then and there intoxicating liquors given by a physician in the regular line of his practice.

Furnishing to a person intoxicated.

Did unlawfully furnish intoxicating liquors to one C D, the said C D being then and there a person intoxicated, and the said E F then and there well knowing that the said C D was intoxicated; said intoxicating liquors, furnished by the said E F to the said C D, as aforesaid, not being then and there intoxicating liquors given by a physician in the regular line of his practice.

Selling to person intoxicated.

Did unlawfully sell intoxicating liquors to one C D, the said C D being then and there a person intoxicated, and the said E F then and there well knowing that the said C D was intoxicated, said liquors not being then and there given by a physician in the regular line of his practice.

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Selling to one in the habit of getting intoxicated.

Did unlawfully sell intoxicating liquors to one C D, he, the said C D, being then and there a person in the habit of getting intoxicated, and he, the said E F, then and there well knowing that the said C D was a person then and there in the habit of getting intoxicated, said liquors not being then and there given by a physician in the regular line of his practice.

Sec. 13199. Intoxicating liquors shall not be sold in brothels.

Whoever sells, exchanges or gives away intoxicating liquor in a brothel shall be fined not less than one hundred dollars nor more than five hundred dollars and imprisoned not less than one month nor more than six months. (88 v. 567, §§ 1, 2; R. S. 6943-5, 6.)

This section is not in conflict with the constitution of this state or of the United States. Schmeltz v. State, 8 C. C. 84; 4 O. C. D. 287.

Sec. 13200. Sale of intoxicating liquors on premises where entertainment is given.

Whoever sells or serves intoxicating liquor on the same floor of a building, hall, room, or rink on which a public dance, roller skating or like entertainment is being held or given, during the progress of such entertainment, or in a room connected therewith by a door or stairway, connecting such hall, room or rink with a room or place on the same floor wherein such liquor is sold or kept for sale, or, being the owner or lessor of a building containing a dance hall, room, or rink fails to post in a conspicuous place therein a copy of this section and the next succeeding section, shall be fined not less than fifteen dollars nor more than one hundred dollars or imprisoned not more than sixty days, or both. (R. S. §§ 6945b, 6945c; 98 v. 62.)

Sec. 13201. Police shall enforce next preceding section.

The mayor of a city or village, where necessary, shall detail police officers to preserve order at a public dance, roller skating rink or other entertainment mentioned in the next preceding section and enforce the provisions thereof. (R. S. § 6945c; 98 v. 62.)

Sec. 13202. Selling or giving away intoxicating liquors near Ohio soldiers' and sailors' home.

Whoever sells or gives away ale, beer, wine, cider or other intoxicating liquor within one mile of the boundary line of lands occupied by a home, retreat, or asylum for disabled volunteer soldiers, or soldiers

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and sailors, established by this state, shall be fined not less than twenty-five dollars nor more than one hundred dollars and imprisoned thirty days. On conviction of the owner or keeper thereof, the place wherein such intoxicating liquor was sold or given away shall be abated as a nuisance within ten days thereafter by order of the court wherein such conviction was had. (R. S. § 6946b; 90 v. 143.)

Constitutionality of act.—An act of April 6, 1893 (90 O. L. 143). This act, entitled "An act to amend supplementary § 6946a of the Revised Statutes of Ohio, passed April 12, 1888, and amended April 13, 1892, and to further supplement original § 6946 of the Revised Statutes," passed April 6, 1893 (90 O. L. 143), is not in conflict with the first branch of Section 26, article II, of the Constitution of Ohio, which ordains that "All laws of a general nature shall have a uniform operation throughout the state," and is a valid law. Driggs v. State, 52 O. S. 37.

National home.—Where one was indicted under the above entitled act for selling intoxicating liquors at a place within one and one-half miles outside of the boundary line of the lands occupied by a National Home for disabled volunteer soldiers, it was not error in the trial court to admit the parol evidence of an officer and of one of the managers of the institution, to prove the existence of such National Home, its occupation by disabled volunteers and soldiers of the United States, and the boundary line of its lands. Driggs v. State, 52 O. S. 37.

Sec. 13203. Same near national military home.

Whoever sells or gives away ale, beer, wine, cider or other intoxicating liquor within one and one-half miles of the boundary line of lands occupied by a home, retreat or asylum for disabled volunteer soldiers, or soldiers and sailors, established by the United States, shall be fined not less than twenty-five dollars nor more than one hundred dollars, and imprisoned thirty days. (R. S. § 6946a; 92 v. 369; 90 v. 143; 89 v. 254; 85 v. 205.)

Sec. 13204. Such place a nuisance.

On the conviction of any person under the next preceding section, the place wherein such intoxicating liquor was sold or given away shall be abated as a nuisance by order of the court wherein such conviction is made, and within ten days thereafter. (R. S. § 6946a; 92 v. 369; 90 v. 143; 89 v. 254; 85 v. 205.)

Sec. 13205. County commissioners may appropriate money.

The commissioners of a county having a home, retreat or asylum, named in section thirteen thousand two hundred and three, shall appropriate from the funds thereof, annually, not more than fifteen hundred

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dollars nor less than one thousand dollars, for the police directors of a city, if there be any within such county, for the enforcement of such section and for all services in state cases within the four-mile jurisdiction of the police court outside of such city. (R. S. § 6946a; 92 v. 369; 90 v. 143; 89 v. 254; 85 v. 205.)

Above three sections are constitutional. See Driggs v. State, 52 O. S. 37.

Sec. 13206. Selling intoxicating liquors or keeping house of ill-fame at certain places prohibited.

Whoever sells intoxicating liquors or keeps a house of ill-fame at or within twelve hundred yards of the administration or main central building of the Columbus state hospital, Dayton state hospital, Athens state hospital, Toledo state hospital, soldiers' and sailors' orphans' home, or any other orphans' home in this state, or within two miles of the boundary line of the boys' industrial school, south of Lancaster, Fairfield county, or within two miles of the place where an agricultural fair is being held, or within one mile of a county children's home of a county of the state situated within one mile of an incorporated village or city in which the sale of intoxicating liquors is prohibited by an ordinance of such village or city, shall be fined not less than twenty-five dollars nor more than one hundred dollars, or imprisoned not more than thirty days, or both. The place wherein such intoxicating liquors are sold shall be shut up and abated as a nuisance by order of the court upon conviction of the owner or keeper thereof. (R. S. § 6946; 93 v. 341; 92 v. 434: 88 v. 603; 85 v. 19; 85 v. 70; 82 v. 222; 71 v. 82, § 1; 53 v. 141, § 3; S. & C. 68.)

Sec. 13207. Exception.

The next preceding section shall not prevent a regular dealer in intoxicating liquor from selling it at his usual place of business within two miles of an agricultural fair. (R. S. § 6946; 93 v. 341; 92 v. 434; 88 v. 603; 85 v. 19; 84 v. 70; 82 v. 222.)

The clause, "Whoever sells intoxicating liquors within two miles of the place where an agricultural fair is being held . . . shall be fined," etc., includes sales made by one whose place of business is permanently located within such distance, is not in conflict with any provision of the constitution, and is a valid law. Heck v. State, 44 O. S. 536.

A place where the industrial products of a people, in agriculture, manufacturing and the arts, are received and placed on exhibition, for the purpose of displaying them and awarding premiums as a reward for excellence, is an agricultural fair, and, although organized for profit under the provisions of §§ 3235 and 3236, Revised Statutes, making it an offense for any one to sell intoxicating liquors within two

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miles of the place where any agricultural fair is being held. State v. Long, 48 O. S. 509.

This applies not only during the hours when the gates are open, but during the entire session of the fair. Theis v. State, 54 O. S. 245.

An affidavit charging the defendant with selling liquor "within twelve hundred yards of the hospital" instead of "within twelve hundred yards of the main building," is insufficient. State v. Ritzman, 8 O. D. 685, 34 Bull. 159.

Where the evidence shows the sale of a bottle of beer contrary to the provisions of this section, it is necessary to show that the beer was intoxicating. State v. Ritzman, 8 O. D. 685, 34 Bull. 159.

Prior to the passage of this section the sale of intoxicating liquor by a regular dealer at his usual place of business within two miles of an agricultural fair was prohibited. Heck v. State, 44 O. S. 536; Lloyd v. Dollison, 3 C. C. (N.S.) 328, 13 O. C. D. 571 (affirmed, without report, State, ex rel., v. Dollison, 68 O. S. 688; affirmed, with report, 194 U. S. 445 14 O. F. D. 380).

For a prosecution under this section, see Nickel v. State, 6 C. C. 601, 602.

Indictment, selling liquors within two miles of fair grounds, sufficiency of. State v. Fromer, 6 O. D. 374.

Sec. 13208. Selling intoxicating liquors near certain meetings.

Whoever sells, exposes for sale, gives, barters or disposes of spirituous or other liquor, or articles of traffic within four miles of the place where an assemblage of people is collected or collecting for religious worship, or for holding a harvest home festival, grand army, sons of veterans' or union veterans' union celebration or reunion, shall be fined not less than ten dollars nor more than one hundred dollars. (R. S. § 6945; 85 v. 30; 77 v. 64; 58 v. 91, § 1; S. & C. 453; S. & S. 288.)

This section is not a legitimate exercise of the police power of the state, and is unconstitutional in that it violates Art. XIV, § 1, of the constitution of the United States, and Art. 1, § 1, of the constitution of Ohio. State v. Coats, 10 N. P. (N.S.) 349, 20 O. D. 561.

Sec. 13209. Exceptions.

The next preceding section does not extend to tavern keepers, distillers, manufacturers, or others lawfully conducting their regular business at the usual place thereof, or to persons disposing of ordinary provisions, excepting spirituous liquors, at their residences, nor to persons having a permit from the trustees or managers of such assemblage, grand army, sons of veterans' or union veterans' union celebration or reunion, for selling provisions to those attending such reunion, in accordance with the regulations of such society ar assemblage and the laws of the state. (R. S. § 6945; 85 v. 30; 77 v. 64; 58 v. 91.)

Sec. 13210. Selling intoxicating liquor near Wilberforce university.

Whoever sells or offers to sell or give away intoxicating liquor, or keeps a house of ill-fame, at or within two miles of Wilberforce university, shall be fined not less than twenty-five dollars nor more than one hundred dollars or imprisoned not more than sixty days, or both; and the place where such intoxicating liquor is sold shall be abated as a nuisance. (91 v. 749, § 1; 86 v. 662; R. S. § 6945-3.)

Sec. 13211. Putting adulterated liquors in branded packages.

Whoever puts adulterated liquor into a barrel, cask or other vessel, branded or marked "pure" by an inspector in this state, or knowingly sells or offers such liquor for sale in packages so branded, shall be imprisoned in the penitentiary not more than twelve months. (R. S. § 7074; 52 v. 108, § 5; S. & C. 730.)

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Sec. 13212. Failing to properly brand packages of liquor.

Whoever, manufacturing and selling intoxicating liquor, fails to brand on each package thereof the name of the person or company manufacturing, rectifying or preparing it, and the words "containing no poisonous drug or other added poison," shall be fined not more than one thousand dollars and imprisoned not less than one month nor more than six months. (R. S. § 6949; 54 v. 183, §§ 2, 3; S. & C. 1436.)

Sec. 13213. Adulterated liquors.

Whoever adulterates spirituous or alcoholic liquor, except for medicinal or mechanical purposes, by mixing a substance with it or sells or offers such liquor for sale, knowing it to be so adulterated, shall be fined not less than one hundred dollars nor more than five hundred dollars, and imprisoned not less than ten days nor more than thirty days. (R. S. § 6950; 52 v. 108, § 1; S. & C. 729.)

Whiskey is recognized as a drug in the United States Pharmacopoeia, and a sale of adulterated whiskey, is an offense under G. C. § 12758, though it be sold as a beverage or commercial commodity, and by one who is neither a druggist nor pharmacist. State v. Hutchinson, 56 O. S. 82.

In a prosecution for selling adulterated wines, an affidavit that does not allege that the liquor was sold for use as a beverage is insufficient. Vester v. State, 1 N. P. 250, 2 O. D. 170.

FORM OF CHARGE.

Adulterating alcoholic liquors.

Unlawfully, wilfully, knowingly and fraudulently did adulterate certain spirituous and alcoholic liquors, to-wit; (name the liquor), and did offer to sell and did sell the same so adulterated to one M N in the amount of (here give the amount sold), the same being mixed with, and adulterated by adding thereto a certain substance known as (here state the substance added, or state that the substance added was to the jurors unknown), the said E F well knowing then and there the said liquors to be so adulterated, and said liquors not being so adulterated for medical or mechanical purposes.

Sec. 13214. Selling uninspected liquors.

Whoever sells or offers to sell spirituous liquor, not inspected as provided by law, shall be fined not less than one hundred dollars nor more than five hundred dollars and imprisoned not less than ten days nor more than thirty days. (R. S. § 4330; 52 v. 108, § 1; S. & C. 729.)

An information, founded on the first section of the act of May 1, 1854 (52 v. 108), must contain the general allegation that the liquors sold were not inspected, and it is not sufficient to aver that they were not inspected in the county where sold, and that the cask containing them did not have the inspector's brand of any other county. Woodworth v. State, 4 O. S. 487; and on the trial the state is bound to give some evidence in support of the negative averment. Cheadle v. State, 4 O. S. 477.

Cited, State v. Hutchinson, 56 O. S. 86.

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Sec. 13215. Saloonkeeper publishing notice given him by husband, parent, etc.

Whoever, being a saloon keeper, grocer or other person, posts a notice in a saloon, grocery or elsewhere, that he has been notified by a husband, wife, child, parent, guardian or other interested person liable to be injured by the sale of intoxicating liquor, not to sell a person intoxicating liquor after five days from the date of such notice, or prints or causes to be printed in a newspaper or circular or gives publicity to it in any other manner, shall be fined not less than ten dollars nor more than fifty dollars. (R. S. § 4362; 72 v. 35, § 2.)

Sec. 13216. Shipping, transporting, etc., intoxicating liquor under fictitious name.

Whoever violates any provision of this section shall be fined not less than fifty dollars nor more than two hundred dollars, and for each subsequent offense shall be fined not less than two hundred dollars nor more than five hundred dollars. No railroad or common carrier, or agent thereof, drayman or other person, corporation or firm, shall ship, receive, transport, carry or handle intoxicating liquor under a false or fictitious name or title. The carriage, transportation, possession, removal, delivery or acceptance with knowledge thereof, of any such liquor under a false or fictitious name or title shall work its forfeiture. The books and way-bills used in handling such liquor may be examined by any public officer at any time to trace such liquor to shipper or receiver. (98 v. 15, § 13; R. S. § 4364-30z.)

The word "ship," as used in G. C. § 13216 means to deliver to a common carrier for transportation; and where intoxicating liquor is bought and paid for in one county, with instructions to the seller by the buyer to ship by express to him in another county, if it be shipped under a false or fictitious name or title, the offense under § 13216 is complete in the county where the liquor is bought and delivered to the express company, and the shipper must be prosecuted there. State v. Bayer, 93 O. S. 72.

The provision of G. C. § 6098 to the effect that "c. o. d. shipments shall be held to be made at the place of destination or where the money is paid or the goods delivered" does not apply to a shipment which is not for collection on delivery; and accordingly, under the provisions of the first paragraph of G. C. § 8426, the sale is completed where intoxicating liquor is bought and delivered by the seller to an express company to be shipped to the buyer in another county. State v. Bayer, 93 O. S. 72.

FORM OF CHARGE.

On the ——— day of ———, 19—, at the county of ——— and State of Ohio, unlawfully and knowingly did ship and transport into the (city, village, township as the case may be) of ——— intoxicating liquors under a false and fictitious

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name, to-wit: (here describe it as for example eight quarts of beer packed in a box and said box marked or labeled "glass").

Sec. 13217. Physician making an unlawful prescription for intoxicating liquor.

Whoever, being a physician, issues a prescription for intoxicating liquor not in writing, or issues a written prescription therefor knowing such liquor to be used as a beverage, or not containing the name and quantity of liquor prescribed, the name of the person for whom prescribed and the date on which such prescription is written and direction for the use of such liquor, shall be fined not less than two hundred and fifty dollars nor more than five hundred dollars, and, for a subsequent offense, shall be fined not less than five hundred dollars nor more than one thousand dollars. (98 v. 17, § 16; R. S. § 4364-30zc.)

Physician's prescription—Liability for issuing.—A physician who issued a prescription for intoxicating liquors in "dry" territory is chargeable with guilty knowledge that the liquor was to be used for beverage purposes, when the circumstances surrounding the transaction were such as to cause him to have good reason to know or to strongly suspect that it was to be so used. State v. Barker, 7 O. L. R. 479.

Where the defense is proffered in a trial on the charge of making sales of intoxicating liquor in "dry" territory, that the sales were made on the prescription of a physician, it is not error to hear testimony as to the reputation of a physician, as bearing on the question of good faith in the issuing of such prescriptions. Rogers v. State, 14 C. C. (N.S.) 177, 22 O. C. D. 389 (reversed, 87 O. S. 308).

FORM OF CHARGE.

Physician issuing unlawful prescription.

State of Ohio, county of ———, ss.

Before me, ———, mayor of the village of ———, ——— county, Ohio, personally came ———, who, being duly sworn according to law, deposes and says:

First. That one ———, being then and there a physician, did issue a writtten prescription for intoxicating liquors for one ———; that said written prescription was issued by said physician for said ———, said physician knowing the same was to be used as a beverage; that said form of prescription was prohibited and unlawful and contrary to § 13217 of the General Code and against the peace and dignity of the State of Ohio.

Second. The affiant aforesaid on his oath aforesaid further says: That on or about the ——— day of ———, 19—, in the village of ———, ——— county, Ohio, one ———, being then and there a physician, did issue a written prescription for intoxicating liquor for one ———; said written prescription issued by said physician for one ——— did not contain the name of liquor prescribed; that said form of prescription was prohibited and unlawful and contrary to § 13217 of the General Code and against the peace and dignity of the State of Ohio.

Third. The affiant aforesaid on his oath aforesaid, further says: That on or about the ——— day of ———, 19—, in the village of ———, ——— county, Ohio, one ———, being then and there a physician, did issue a written prescription

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for intoxicating liquor for one———; that said prescription did not contain the quantity of the liquor; that said prescription was prohibited and unlawful and contrary to § 13217 of the General Code and against the peace and dignity of the State of Ohio.

Fourth. The affiant aforesaid on his oath aforesaid further says: That on or about the ——— day of ———, 19—, in the village of ———, ——— county, Ohio, one ———, being then and there a physician, did issue a written prescription for intoxicating liquor for one ———; that said prescription did not contain the name of the person to whom said prescription was issued; said form of prescription was prohibited and unlawful and contrary to § 13217 of the General Code, and against the peace and dignity of the State of Ohio.

Fifth. The affiant aforesaid on his oath aforesaid further says: That on or about the ——— day of ———, 19—, in the village of ———, ——— county, Ohio, one ———, being then and there a physician, did issue a written prescription for intoxicating liquor for one ———; that said prescription did not contain the date on which the prescription was written; that said form of prescription was prohibited and unlawful and contrary to § 13217 of the General Code and against the peace and dignity of the State of Ohio.

Sec. 13218. Further punishment of physician so convicted.

Whoever, being a practicing physician, who has been convicted of issuing a verbal prescription for intoxicating liquor, or issuing a prescription therefor in a form which does not comply with law, or issuing a prescription, knowing such liquor to be for use as a beverage, issues a prescription for intoxicating liquor within two years from the date of such conviction, shall be fined not less than two hundred and fifty dollars nor more than five hundred dollars, and, for each subsequent offense, shall be fined not less than five hundred dollars nor more than one thousand dollars. (98 v. 17, § 16; R. S. 4364-30zc.)

Sec. 13219. Saloonkeeper making false answer in statement to assessor.

Whoever, being engaged in the business of trafficking in spirituous, vinous, malt or other intoxicating liquors, makes false answer to a question set out in the statement which he is required by law to make to the assessor, upon indictment and conviction, shall be fined not less than one hundred dollars nor more than five hundred dollars or imprisoned not less than three months nor more than two years, or both. (100 v. 90, § 5a.)

The act of March 12, 1909 (100 O. L. 89), (G. C. § 13219), to amend and supplement § 5 of an act entitled: "An act providing against the evils resulting from the traffic in intoxicating liquors," is a valid exercise of legislative power not repugnant to the state or federal constitutions. Bloomfield v. State, 86 O. S. 253.

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Sec. 13220. Engaging in liquor business after conviction under preceding section.

Whoever, having been convicted of a violation of the next preceding section, thereafter engages in or carries on the business of selling any vinous, malt, spirituous or intoxicating liquors as a beverage, upon indictment and conviction, shall be fined not less than two hundred dollars nor more than one thousand dollars or imprisoned not less than six months nor more than two years, or both. (100 v. 90, § 5a.)

Sec. 13221. Engaging in liquor business after making affirmative answer in statement to assessor.

Whoever, being engaged in the business of trafficking in spirituous, vinous, malt or other intoxicating liquor, makes affirmative answer to a question set out in the statement which he is required by law to make to the assessor, or fails or refuses to answer a question set out therein or sign and verify such statement before the assessor, and thereafter engages in the sale, furnishing or giving away of intoxicating liquor as a beverage, upon indictment and conviction, shall be fined not less than two hundred dollars nor more than one thousand dollars or imprisoned not less than six months nor more than two years, or both. (100 v. 89, § 5.)

Sec. 13222. Engaging in liquor business after the place has been abated as a nuisance.

Whoever, having been the proprietor of a place where the sale of intoxicating liquors was carried on, which has been abated as a public nuisance by an order of court because it was conducted in a disorderly or disreputable manner, thereafter engages in or carries on the business of selling intoxicating liquor as a beverage, upon indictment and conviction, shall be fined not less than two hundred dollars nor more than one thousand dollars or imprisoned not less than six months nor more than two years, or both. (100 v. 90, § 5b.)

Sec. 13223. Soliciting orders for intoxicating liquor in certain territory.

Whoever, directly or indirectly, solicits orders for intoxicating liquor in a county or territory where the sale of such liquor as a beverage is prohibited shall be fined not less than one hundred and fifty dollars nor more than four hundred dollars, and, for each subsequent offense, shall be fined not less than four hundred dollars nor more than eight hundred dollars. (100 v. 92, § 4.)

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Section 4 of the act passed March 12, 1909 (100 O. L. 89), (G. C. § 13223), entitled "An act to amend and supplement § 5 of an act entitled, 'An act providing against the evils resulting from the traffic in intoxicating liquors,' passed May 14, 1886, as amended March 28, 1906, and to further provide against the evils resulting from the traffic in intoxicating liquors," which section makes it an offense to solicit orders for intoxicating liquors in any county where the sale as a beverage is prohibited, is not violative of the constitution of the state and is a valid law. Hayner v. State, 83 O. S. 178.

To prove a violation of this section it is not necessary to show a number of solicitations. By virtue of R. S. § 6794 (G. C. § 12368), which provides that words in the plural include the singular, and in the singular include the plural, proof of one solicitation satisfies the requirements of the statute. Such solicitation may be made by letter as well as in person. Hayner v. State, 83 O. S. 178.

Where a letter soliciting an order for the sale of liquor provides, as a condition of sale, that the person solicited, on receiving the liquor, has the option to accept or not, and to send the price named only in case he approves the goods and concludes to purchase, otherwise to return them at the sender's expense, such approval and conclusion to purchase are necessary to complete a sale. Therefore, the solicitation is for a sale to be completed in the county of the residence or business of the one solicited, and prosecution for violation of the act is properly conducted in such county. Hayner v. State, 83 O. S. 178.

The inference may reasonably be drawn that the manager or person in charge of an office, from which emanate letters or circulars soliciting trade, has knowledge of such solicitation and is responsible therefor; and where such an inference as to the solicitation by mail in "dry" territory of orders for intoxicating liquors was not modified or rebutted by evidence, and the defendant remained silent when confronted by evidence of that character, a reviewing court is not justified in holding that a finding of guilty by the court below was so clearly against the weight of the evidence as to require a reversal of the judgment. Hinz v. State, 15 C. C. (N.S.) 88, 23 O. C. D. 296 (affirmed, 86 O. S. 348).

The provisions of G. C. § 13246 requiring the granting of leave by the reviewing court before a petition in error shall be filed to reverse a conviction for violation of a law prohibiting the sale of intoxicating liquors in a territory or district, do not apply to a conviction under this section. Cannon v. State, 89 O. S. 409.

FORM OF CHARGE.

On the ——— day of ———, 19—, at the county of ——— and State of Ohio, and within the limits of (here insert the name of the municipality or township in which the solicitation was made) in said county, where the sale of intoxicating liquors as a beverage is prohibited and unlawful, did unlawfully solicit orders for such intoxicating liquors, which said soliciting of orders for such intoxicating liquors, was then and there prohibited and unlawful.

Sec. 13224. Invalidity of certain provisions; shall not affect others.

If any provision of the next five preceding sections, for any reason, is held to be invalid or void, it shall not invalidate any other provision therein contained. (100 v. 91, § 5d.)

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FORM OF CHARGE.

Affidavit against soliciting orders.

State of Ohio, ——— county.

Before me, ———, mayor of the village of ———, county of ———, State of Ohio, personally came ———, who being duly sworn according to law deposes and says:

That on or about the ——— day of ———, A. D. 19—, in the county of ———, in which the sale of intoxicating liquors as a beverage was then and there prohibited, one ——— did then and there directly and indirectly solicit an order for intoxicating liquors as a beverage from ——— by means of a communication by mail by the said ——— from ———, Ohio, to the said ——— on or about the ——— day of ———, 19—, at ———, Ohio, county of ———, in which the sale of intoxicating liquor as a beverage was then and there prohibited.

That said soliciting of said order was then and there prohibited and contrary to § 13223 of the General Code and against the peace and dignity of the State of Ohio.

Sec. 13224-1. Free lunch—Crackers, cheese and pretzels.

That it is hereby declared to be unlawful for any person engaged in the business of selling, furnishing or giving away malt, brewed, fermented, vinous or intoxicating liquors at retail by himself, his clerk, servant, agent or representative, directly or indirectly, to give away or furnish to any person free of charge in the place where said business is carried on, any food except crackers, cheese and pretzels. (101 v. 357.)

Sec. 13224-2. Sale of lunch not to include drinks.

It shall hereafter be unlawful for any person engaged in the business of selling, furnishing or giving away malt, brewed, fermented, vinous or intoxicating liquors at retail by himself, his servant, clerk, agent or representative to give away or furnish to any person in any place where said business is carried on any intoxicating liquors in consideration in part or in whole for any food purchased in such place. (101 v. 357.)

Sec. 13224-3. Penalty.

Any person violating the provisions of this act shall be punished by a fine of not less than fifty dollars nor more than one hundred dollars, or imprisonment not more than ten days, or both. (101 v. 357.)

Held to be invalid, State v. Feld, 12 O. L. R. 64, and also in State v. Foucar, 8 O. L. R. 317; held to be valid in State v. Gallagher, 8 O. L. R. 305.

State v. Gallagher, 8 O. L. R. 305, is regarded as modified by the adoption of Art. XV, § 9, of the constitution of Ohio, which provides that a license to traffic in intoxicating liquors shall be granted.

LOCAL OPTION.

Sec. 13225. Selling liquor thirty days after election prohibiting same in the county.

Whoever, after thirty days from the date of an election held within a county to determine by ballot whether the sale of intoxicating liquors

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as a beverage should be prohibited therein, a majority of votes at such election having been cast in favor of prohibiting such sale, within the limits of such county, in any manner directly or indirectly, sells, furnishes, gives away or otherwise deals in intoxicating liquors as a beverage or keeps or uses a place, structure or vehicle, either permanent or transient, for such selling, furnishing or giving away or in which or from which intoxicating liquors are so sold, given away, furnished or otherwise dealt in, or, within the limits of such county violates any provision of law relating to such election or the sale, furnishing, giving away or otherwise dealing in intoxicating liquors as a beverage, shall be fined not less than fifty dollars nor more than two hundred dollars, and, for each subsequent offense, shall be fined not less than two hundred dollars nor more than five hundred dollars. (99 v. 36, § 2.)

See Art. XV, § 9a, of the Ohio constitution.

ILLEGAL SALES.

"Beverage."—When intoxicating liquor is furnished for any other than a legitimate legal purpose, it is furnished for use as a "beverage." Lamma v. State, 8 N. P. (N.S.) 69, 19 O. D. 289.

It is unlawful to sell malt liquor to be used as a beverage in a county of this state where the county local option law is in force, whether such malt liquor is in fact intoxicating or nonintoxicating. Such is the effect of section three (§ 3) of said enactment, which declares that the "phrase 'intoxicating liquor,' as used in this act, shall be construed to mean any distilled malt, vinous or any intoxicating liquor whatever." See 99 O. L. 35. State v. Walder, 83 O. S. 68.

"Furnishing"—Construed.—The word "furnishing," as used in the county local option law should be given a broad meaning for the purpose of carrying out the will of the people as expressed at the ballot box; and when it appears that the defendant authorized a person to dispose of liquor which he had on hand by sale, and he does so dispose of it to be used as a beverage, it is not error to refuse to discharge the defendant at the conclusion of the state's evidence. Lamma v. State, 8 N. P. (N.S.) 69, 19 O. D. 289.

—— **defined, etc.**—The expression "furnishing" in liquor laws is the broad comprehensive term used to describe any mode of putting spirits in the power of another. Lamma v. State, 8 N. P. (N.S.) 69, 73, 19 O. D. 289.

Internal revenue tax, effect of, on.—A receipt from the United States government for the tax levied upon the retailer of intoxicating liquors does not authorize the owner to violate any of the laws of the state where issued, nor to sell intoxicating liquors at retail in any county where the sale is prohibited by law. State v. Kendle, 8 N. P. (N.S.) 109, 19 O. D. 721 (case affirmed, no report).

Nonintoxicating malt liquor.—The sale of malt liquor as a beverage is not within the inhibition of the Rose county local option law, where the percentage of alcohol contained in said liquor is so small as to render it nonintoxicating. Graham v. State, 9 N. P. (N.S.) 174.

Physician's prescription—Liability for issuing.—A physician who issued a prescription for intoxicating liquors in "dry" territory is chargeable with guilty knowledge that the liquor was to be used for beverage purposes, when the circumstances surrounding the transaction were such as to cause him to have good reason to know or to strongly suspect that it was to be so used. State v. Barker, 7 O. L. R. 479.

In order to bring a sale of liquor in "dry" territory within the exception making a sale for pharmaceutical purposes lawful, it must appear that the transaction was in good faith on the part of the seller, and the mere keeping of a book containing the record signed by the purchaser, that the liquor in question was to be used for pharmaceutical purposes, does not relieve the seller from compliance with the requirement of good faith. Carmack v. State, 13 C. C. (N.S.) 362, 22 O. C. D. 46 (motion for leave overruled, 8 O. L. R. 107).

"Intoxicating liquor"—What is.—A beverage containing no more than four-tenths of one per cent. of alcohol is not an intoxicating liquor within the meaning of the Rose law. State v. Nunlist, 9 N. P. (N.S.) 103.

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Inasmuch as the Rose local option law provides its own exceptions, it is not permissible to read into it the exceptions found in the Dow law as to sale of intoxicating liquor at the manufactory and by the manufacturer in quantities of one gallon or more at any one time; but such sales are prohibited within a county where the Rose law has become operative.

Where in a county which has been voted "dry" under the Rose law, beer is sold from a brewery in quantities of one gallon or more in conformity with general instructions by the manager, he is liable to prosecution therefor notwithstanding he was absent from the brewery at the time the sale was made. Scheu v. State, 12 C. C. N. S. 118.

When a purchaser living in a local option district orders, in writing by mail, from a person lawfully engaged in the liquor business outside of such district, a package of liquor to be sent to him for his own use by express C. O. D. to a station within the prescribed district, and such purchaser received such package, pays the price for the same and the charges for the return of the money to the express company for the seller, the sale is complete upon the delivery of the package to the express company by the seller and he does not violate the law in the prescribed district. Mullen v. State, 10 C. C. N. S. 417; 20 O. C. D. 251.

See § 6098, which is as follows:

"Sales of intoxicating liquor to be paid for on delivery, commonly called C. O. D. shipments, shall be held to be made at the place of destination, or where the money is paid or the goods delivered."

An affidavit charging the keeping of a place where intoxicating liquors were sold, furnished or given away on a designated day, is sufficient to sustain a prosecution under the Rose county local option law. Lynch v. State, 12 C. C. N. S. 330; affirmed, 81 O. S. 489.

Constitutionality.—The county local option law is not unconstitutional as a denial of constitutional liberty in making it possible to prohibit the liquor traffic within certain territory; or because the act violates the principle of the inviolability of private property; or because it is a general law without uniform operation; or in contravention of the principle that no act shall "take effect" upon the approval of any other authority than the general assembly. Gassman v. Kerns, 7 N. P. N. S. 626; 19 O. D. 317; case affirmed, no report, 81 O. S. 496.

CRIMINAL PRACTICE.

Affidavit—Sufficiency under county local option.—An affidavit charging violation of the county local option law is sufficient when it avers that the defendant, at a time and place named, did then and there furnish intoxicating liquors as a beverage to a person named, and that the furnishing of said intoxicating liquor by defendant as aforesaid was then and there prohibited and unlawful. Lamma v. State, 8 N. P. N. S. 69; 19 O. D. 289.

In prosecutions begun in the probate court, under favor of G. C. §§ 13195 and 13225, information must be filed by the prosecuting attorney in accordance with G. C. § 13441, before the probate court has jurisdiction to try such prosecutions. Rogers v. State, 87 O. S. 308 (reversing 22 O. C. D. 389).

Attorney for prosecution—Who may act as.—An attorney other than the prosecuting attorney may appear for the prosecution for a violation of the Beal law and may file a reply to a plea in bar. Gilliam v. State, 7 N. P. (N.S.) 482, 53 B. 399.

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Proof of one unlawful sale is sufficient to sustain a conviction under such a charge; and the affidavit need go no further than to aver an unlawful sale, leaving it to be developed by the evidence in what respect the sale was unlawful. Lynch v. State, 12 C. C. (N.S.) 330 (affirmed, 81 O. S. 489).

The provision of § 1 of the Rose law, making a certified copy of the result of a county local option election sufficient proof of the holding of such an election, is not exclusive; but any evidence from which the fact may be deducted that such an election has been held is sufficient to sustain a prosecution for violation of the act. Lynch v. State, 12 C. C. (N.S.) 330 (affirmed, 81 O. S. 489).

Evidence—Hearsay.—It is not error to admit the statement of a witness that "a police officer told him where he obtained liquor in dry territory" if no disclosure is made by the witness as to the place where the liquor was obtained or the person who sold or furnished it. Lynch v. State, 12 C. C. (N.S.) 330 (case affirmed, no report, 81 O. S. 489).

In a prosecution under § 2 of the act of March 5, 1908 (99 O. L. 35), for keeping a place where intoxicating liquors are sold contrary to the provisions of said section, it is not necessary to prove actual knowledge on the part of the keeper of the premises of unlawful sales of liquor made thereon, where such sales were made by one placed by him in charge of the premises. State v. Fuller, 13 C. C. (N.S.) 405, 22 O. C. D. 465.

The failure of a county clerk to sign his certificate attached to the record of a local option election, showing the result to have been that the county was voted "dry," renders the certificate invalid as evidence; but the contention that the county was in fact voted "dry" may be sustained by other evidence. State v. Hinkelman, 13 C. C. (N.S.) 321, 22 O. C. D. 1 (affirmed, 83 O. S. 446).

It is error for the court in a criminal prosecution or violation of the county local option law to take judicial notice that such county had voted upon the question of local option and was dry territory. Geisse v. State, 85 O. S. 457 (reversing Geisse v. State, 13 C. C. (N.S.) 385, 22 O. C. D. 560).

——**keeping a place.**—Proof of one unlawful sale is sufficient to sustain a conviction under a charge of keeping a place where intoxicating liquors are sold. Lynch v. State, 12 C. C. N. S. 330; case affirmed, no report, 81 O. S. 489.

From and after thirty days from the time a majority of the electors of a county have legally voted in favor of prohibiting the sale of intoxicating liquors as a beverage within the limit of such county, as is authorized by the provisions of "An act further to provide against the evils resulting from the traffic in intoxicating liquors by providing for local option in counties," passed March 5, 1908 (99 O. L. 35), (G. C., § 13225), it is unlawful for any person, personally, or by agent, in said county, to sell, furnish or give away intoxicating liquors to be used as a beverage, except as permitted by section three (§ 3) of said act; and the prohibition under said act extends to and includes the sale, furnishing or giving away of intoxicating liquors in the county at the manufactory by the manufacturer, or by his agent, to be used as a beverage, although the sale be "in quantities of one gallon or more at any one time." Scheu v. State, 83 O. S. 146.

In construing the provisions of said act, the court is not authorized to interpolate, as a part thereof, to affect the meaning and application of said act, the exceptions contained in § 4364-16, Revised Statutes (Bates'), known otherwise as section eight (§ 8) of the Dow-Aikin tax law. Scheu v. State, 83 O. S. 146.

—— Testimony to the effect that one accused of selling intoxicating liquor in a county voted dry under the Rose law continued to use bar fixtures and had an

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internal revenue license of a date prior to the local option election still tacked on his wall, and a certain individual seemed to act strangely after leaving his place, is not sufficient to convict of keeping a place where intoxicating liquors are sold. State v. Nunlist, 9 N. P. N. S. 103.

——**negative averments,** failure to prove not ground for setting aside conviction where testimony tends to sustain. Lutkehaus v. Mt. Healthy, 11 C. C. N. S. 536; 21 C. D. 281.

——**of election making sale illegal.**—The provision of § 1 of the Rose county local option law, making a certified copy of the result of a county local option election sufficient proof of the holding of such an election, is not exclusive, but any evidence from which the fact may be deduced that such an election has been held is sufficient to sustain a prosecution for violation of the act. State v. Lynch, 12 C. C. N. S. 330; case affirmed, no report, 81 O. S. 489.

First and subsequent offenses—Second offense charged as first—Plea of guilty, effect of.—A plea of guilty of selling intoxicating liquor on Sunday in an action which was prosecuted as a first offense, but might have been prosecuted as a second offense, is a bar to a subsequent prosecution of the same defendant in another court for the same sale charged as a second offense. State v. Lynch, 7 N. P. N. S. 365; 53 B. 388.

——— **second offense not charged.**—Where an affidavit charging the keeping a saloon open on Sunday does not charge that it was a second offense, the trial must be for a first offense and the penalty imposed must be within the limitations prescribed for a first offense. Holoway v. State, 6 O. L. R. 241.

——**what constitutes second offense—Sale on Sunday—Keeping open on Sunday.**—Inasmuch as the unlawful sale of intoxicating liquors on Sunday, and unlawfully allowing a place where intoxicating liquors are sold to remain open on Sunday, are merely different forms of committing the same legal offense, the unlawful sale of intoxicating liquors on Sunday can be charged as a second offense, when the first conviction was for unlawfully allowing a saloon to remain open on Sunday. Jung v. State, 7 N. P. N. S. 397; 19 O. D. 245; case affirmed, no report.

FORMS OF CHARGES.

Affidavit—For selling contrary to county option law.

IN THE MAYOR'S COURT.

State of Ohio, ——— county, ss.:

Before me, ———, mayor of the ——— (village or city) of ——— county, Ohio, personally came ——— who being duly sworn according to law deposes and says:

That on or about the ——— day of ———, A. D. 19—, in the county of ———, State of Ohio, one ——— did then and there unlawfully sell intoxicating liquors as a beverage to one ———. That the selling of intoxicating liquors as aforesaid by the said ——— was then and there prohibited and unlawful and contrary to § 13225 of the General Code, and against the peace and dignity of the State of Ohio.

For violation of municipal option law, erase 13225 and insert 13232.

For violation of township option law, erase 13225 and insert 13229.

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Affidavit—For keeping a place contrary to county option law.

IN THE MAYOR'S COURT.

State of Ohio, ——— county, ss.:

Before me, ———, mayor of the ——— (village or city) of ——— county, Ohio, personally came ——— who being duly sworn according to law deposes and says:

That from the ——— day of ———, A. D. 19—, until the ——— day of ———, 19—, in the county of ———, State of Ohio, ——— one ———, then and there being, did unlawfully keep a place where intoxicating liquors were then and there kept for sale as a beverage. That the keeping of said place as aforesaid by said ——— was then and there prohibited and unlawful and contrary to § 13225 of the General Code, and against the peace and dignity of the State of Ohio.

For violation of municipal option law, erase 13225 and insert 13232.

For violation of township option law, erase 13225 and insert 13229.

Sec. 13226. Same when subsequent offense.

On conviction for a second or subsequent offense, as provided in the next preceding section, the court shall order the place where such liquor is sold, furnished or given away for beverage purposes, to be abated as a nuisance or shall order the person so convicted to give bond payable to the State of Ohio in the sum of one thousand dollars with sureties to the acceptance of the court that he will not sell, furnish or give away intoxicating liquor as a beverage within the limits of such county in violation of law. (99 v. 36, § 2.)

For form of bond, see § 13195.

In a prosecution which comes within the principle of § 13243, a discretion is given the trial judge to continue the case beyond the thirtieth day, and jurisdiction of the case is not lost by so doing. Carmack v. State, 13 C. C. (N.S.) 362, 22 O. C. D. 46 (motion for leave overruled, 8 O. L. R. 107).

In order to bring a sale of liquor in "dry" territory within the exception making a sale for pharmaceutical purposes lawful, it must appear that the transaction was in good faith on the part of the seller, and the mere keeping of a book containing the record signed by the purchaser, that the liquor in question was to be used for pharmaceutical purposes, does not relieve the seller from compliance with the requirement of good faith. Carmack v. State, 13 C. C. (N.S.) 362, 22 O. C. D. 46 (motion for leave overruled, 8 O. L. R. 107).

Sec. 13227. What allegations are necessary.

In indictments, affidavits, or information for violation of section thirteen thousand two hundred and twenty-five, it shall not be necessary to set forth the facts showing that the required number of electors in the county petitioned for an election and that the election was held or that the majority thereof voted in favor of prohibiting the sale as therein provided, but it shall be sufficient to state that the act complained of was then and there prohibited and unlawful. (99 v. 37, § 5.)

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Sec. 13228. Who shall prosecute for violations.

It shall be the special duty of the prosecuting attorney of the county, the attorney for any village and the city solicitor of any city in the county to prosecute cases for violation of the next three preceding sections, and the common pleas court shall charge each grand jury to investigate all violations of such sections. (99 v. 38, § 10.)

Sec. 13229. Selling liquor thirty days after election prohibiting same in township.

Whoever, after thirty days from the date of an election held within a township outside the limits of a municipal corporation to determine by ballot whether the sale of intoxicating liquors as a beverage should be prohibited therein, a majority of votes at such election having been cast in favor thereof, within such township, sells, furnishes or gives away such liquors to be used as a beverage, or keeps a place where such liquors are so kept for sale, given away or furnished, shall be fined not less than fifty dollars nor more than five hundred dollars and imprisoned in jail not more than six months. (85 v. 55, § 2; R. S. 4364-25.)

Sec. 13230. Indictments.

In indictments under the next preceding section, the fact that the township has availed itself of the provisions of law as to prohibiting the sale of intoxicating liquor by an election lawfully held need not be set forth and it shall be sufficient to plead that such selling, furnishing, giving away or keeping such place was prohibited and unlawful. (85 v. 55, § 3; R. S. 4364-26.)

Sec. 13231. Fines.

All fines collected under section thirteen thousand two hundred and twenty-nine shall be paid into the treasury of the county and be ac credited to the poor fund thereof. (85 v. 57, § 7; R. S. 4364-30.)

An indictment under § 4364-25, Revised Statutes (G. C., §13229), charging defendant with unlawfully keeping a place where intoxicating liquors are kept for sale as a beverage, if otherwise sufficient in form and allegation, is not de murrable because it contains no averment which excludes said defendant from the operation of the proviso in said section contained. Such proviso is no part of the description of the particular offense charged in the indictment. Hamilton v. State, Clarke v. State, 78 O. S. 76.

In the trial of a prosecution under § 4364-25, Revised Statutes (G. C., § 13229), for keeping a place where intoxicating liquors are kept for sale, given and furnished as a beverage, and for an illegal sale of intoxicating liquors to be used as a beverage, it is error to admit, over the objection of the state, testimony that the defendant, at other times refused to sell or give away such liquor as a beverage to the same or other persons. State v. Linder, 76 O. S. 463.

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Where, in such case, the evidence tends to show that the place was a room used for business purposes, and commonly called a bar-room, and does not tend to show that the same was or had been used as a dwelling or part thereof, it is misleading, and for that reason error for the court to charge the jury that the law was never intended to prevent a man from, in his own home, treating a friend, if he is his guest, to a drink of liquor, for a man has a right to give to a guest, that is a visitor, to his home, as a guest, intoxicating liquors, if it be done in good faith and without any intention of violating the law. Such charge offends against the rule that the instructions to the jury should be confined to the case which the evidence tends to establish. State v. Linder, 76 O. S. 463.

The sale of beer as a beverage, in any quantity, whether by the manufacturer or not, is prohibited in a township where the people have availed themselves of the provisions of the local option law, passed March 3, 1888 (85 Laws, 55); and being a police regulation, a sale of an unbroken package made in such township by an agent of a manufacturer, located in another state, is not protected from the operation of the law on the ground that it interferes with interstate commerce, such police power being conferred on the states by an act of congress adopted August 2, 1890, known as the Wilson act (26 Stat. 313). Stevens v. State, 61 O. S. 597.

The fact that the provision in the local option law, restricting the sale of wine to such as is manufactured from the pure juice of the grape "cultivated in this state," may be invalid as a discrimination in favor of domestic wines, does not affect the provisions of the statute as a whole; the other provisions being open to no such objection are valid. Stevens v. State, 61 O. S. 597.

Provisions of G. C. § 13195 neither supersede nor repeal by implication this penal section of the township local option law. Hamilton v. State, 78 O. S. 76.

Where upon a trial on an indictment for selling intoxicating liquors as a beverage in a township where such selling is prohibited the evidence tends to show a number of sales to different persons upon the same night, it is the duty of the court, upon motion of the defendant, at the conclusion of the testimony for the state, to require the prosecuting attorney to elect upon which sale he relies for conviction. Stick v. State, 13-23 C. C. 392.

In such case, it is error for the court to charge the jury, "that the record of the township trustees showing the majority of votes, cast at an election, held for the purpose of determining whether or not, intoxicating liquor should be sold as a beverage in the township, were against the sale, made a prima facie case that the sale was prohibited and that it devolves upon the defendant to show by a preponderance of the evidence that the election was "illegal." The burden is upon the state in such case to show beyond a reasonable doubt that the election was held in conformity to the statute. Stick v. State, 13-23 C. C. 392.

See § 13225 for form of charge.

FORM OF CHARGE.

That on the ——— day of ———, 19— (or from the ——— day of ———, 19—, until the ——— day of ———, 19—), at the county of ———, and State of Ohio, and in the township of ——— and outside of any municipal corporation in said county of ———, one E F, then and there being, did unlawfully keep a place where intoxicating liquors were then and there kept for sale as a beverage. That the keeping of the said place as aforesaid by the said E F was then and there prohibited and unlawful and contrary to G. C. § 13229.

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Sec. 13232. Selling liquor thirty days after election prohibiting same in municipality.

Whoever, after thirty days from the date of an election held within a municipal corporation to determine by ballot whether the sale of intoxicating liquor as a beverage should be prohibited therein, a majority of votes at such election having been cast in favor of prohibiting such sale within such municipality, in any manner directly or indirectly, sells, furnishes, gives away, or otherwise deals in intoxicating liquors as a beverage or keeps or uses a place, structure or vehicle, either permanent or transient, for such selling, furnishing or giving away or in which or from which intoxicating liquors are so sold, given away, furnished or otherwise dealt in, shall be fined not less than fifty dollars nor more than two hundred dollars, and for a second offense shall be fined not less than one hundred dollars nor more than five hundred dollars, and, for each subsequent offense shall be fined not less than two hundred dollars and imprisoned not less than ten days nor more than sixty days. (R. S. § 4364-20b; 95 v. 88.)

Revised Statutes §§ 4364-20a and 4364-20b (G. C. §§ 6127, 6128, and 6129 and 13232), which provide for an election in any municipality to determine whether or not the sale of intoxicating liquors as a beverage within the limits of such municipality shall be prohibited, and prescribed punishment for violations of said act where such sales are so prohibited, apply to hamlets as the same existed in this state prior to the adoption of the municipal code, October 22, 1902.

The term "offense," as used in the lastnamed section, is the equivalent of conviction. Hence an affidavit for prosecution under said act which charges three separate sales to different persons on the same day, but does not allege a previous conviction, is in legal effect a charge of a first offense only, and the party so charged is not entitled to be tried by a jury.

The maximum fine provided by the act for the first offense being two hundred dollars only, a fine of three hundred dollars is in such case excessive and erroneous. Carey v. State, 70 O. S. 121.

In prosecutions founded on affidavit, information or indictment for selling intoxicating liquors to be used as a beverage, in violation of R. S. §§ 4364-20b and 4364-20c (G. C. §§ 13232 and 6064, 6066, 6103 and 6104), it is necessary to a sufficient charge against the accused, that the affidavit, information or indictment, as the case may be, allege the name of the purchaser of such intoxicating liquors, or that his name is to the affiant, informant, or grand jury unknown. State v. Ridgway, 73 O. S. 31.

For the purpose of such review, under the provisions of section twenty (§ 20) of the act of the general assembly entitled "An act to provide for the enforcement of local option laws prohibiting the sale of intoxicating liquors as a beverage," passed February 23, 1906 (98 O. L. 12), the circuit court may grant leave to the convicted party to file a petition in error therein to review the judgment of conviction. State v. Mattingly, 79 O. S. 79.

It is not a violation of the act entitled, "An act further to provide against the evils resulting from the traffic in intoxicating liquors by providing for local option in counties" (99 O. L. 35), for one who lives in a county in which the traffic in intoxicating liquors is prohibited under the provisions of the said act, to go into a county where such traffic is not prohibited and purchase intoxicating liquor in any quantity for his own use, and bring the same into the county where he lives to be used therein by him as a beverage; and such a person may, under said statute, not only himself purchase intoxicating liquor as, and for the specific pur-

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pose, aforesaid, but he may also do so by another, whom he has constituted his agent for that purpose. State v. Lynch, 81 O. S. 336.

The construction of the act entitled "An act further to provide against the evils resulting from the traffic in intoxicating liquors by providing for local option in counties" (99 O. L. 35), which was adopted in State v. Lynch, 81 O. S. 336, is followed in this case. State v. Wirick, 81 O. S. 343.

It is error for the court in a criminal prosecution for violation of the county local option law to take judicial notice that such county had voted upon the question of local option and was dry territory. Geisse v. State, 85 O. S. 457.

The sale of beer as a beverage, in any quantity, whether by the manufacturer or not, is prohibited in a township where the people have availed themselves of the provisions of the local option law, passed March 3, 1888 (85 Laws, 55); and, being a police regulation, a sale of an unbroken package made in such township by an agent of a manufacturer, located in another state, is not protected from the operation of the law on the ground that it interferes with interstate commerce, such police power being conferred on the states by an act of congress adopted August 2, 1890, known as the Wilson act (26 Stat. 313). Stevens v. State, 61 O. S. 597.

Failure to publish for a full period of ten days the mayor's proclamation of a special election to be held under R. S. §§ 4364-20a, et seq. (commonly called the Beal local option election law), is not fatal to the validity of the election, where the election was otherwise regularly held, knowledge of its approach was general throughout the municipality, and a comparatively full vote was cast, and no attempt was made to deceive or mislead any one, and it does not appear that any elector was either without knowledge thereof, kept from voting or failed to vote on account of the failure to give full ten days' notice. Publication of notice for ten days, under such circumstances, is not jurisdictional, and failure to publish it for the full period is a mere irregularity which does not invalidate the election. Fike v. State, 15 O. C. D. 554.

The validity of a special local election held under R. S. §§ 4364-20a, et seq. which resulted in the prohibition of the sale of intoxicating liquors within a municipality, can not be collaterally impeached by a defendant in a criminal prosecution for selling intoxicating liquor in violation thereof, notwithstanding he may have moved into the municipality after the election. The election contest provided by R. S. § 4364-20i, is exclusive, and the general rule that a defendant in a criminal action may raise the constitutionality of the law under which he is prosecuted has no application to such cases. Fike v. State, 15 O. C. D. 554.

Mayors' courts are without authority to grant a change of venue in misdemeanor prosecutions; final jurisdiction thereof, is given such courts under R. S. §§ 1817 and 6529 (G. C. §§ 4528 and 10306), providing for a change of venue before justices of the peace when the justice is a material witness in the case or is prejudiced, is not applicable to mayors' courts. Fike v. State, 15 O. C. D. 554.

The judgment of a mayor's court in misdemeanor prosecutions can not be reviewed upon the weight of the evidence. R. S. § 6565 relating to bills of exceptions before mayors and justices of the peace, only provides for a review on questions of law, not of fact; and R. S. § 1752 only authorizes such review when the judgment is one of conviction for violating a municipal ordinance. Fike v. State, 15 O. C. D. 554.

The fact that an election was held under the Beal local option law, and also the result thereof, may be established by evidence other than the original entry on the records of the municipal council, or a copy thereof certified by the corporation clerk as provided by R. S. § 4364-20a, which makes such record or certified copy prima facie evidence of such facts. Hence, the failure of the clerk to record, in the proper way and place, the result as reported to him, does not invalidate the election, if an election and the result thereof can be clearly established by other evidence. Dalrymple v. State, 5 C. C. (N.S.) 185, 16 O. C. D. 562.

Where a duly and legally constituted legal body, such as a city or village council, has acted, the presumption is, in the absence of evidence to the contrary, that it has acted lawfully, and had before it sufficient facts to warrant it in acting. This presumption is in the nature of evidence, and until overcome by other evidence, it stands as proof of the fact in question. Dalrymple v. State, 5 C. C. (N.S.) 185, 16 O. C. D. 562.

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The presumption is that a petition for an election under the Beal local option law, in due and legal form and signed by forty per cent. of the qualified electors of the municipality, was presented to council as required by R. S. § 4364-20a, when it appears from the council record that a petition was presented asking for an election, that it was duly acted upon, and that an election was ordered on a certain date. Dalrymple v. State, 5 C. C. (N.S.) 185, 16 O. C. D. 562.

The names of persons to whom liquors were sold need not be set forth in an affidavit charging the offense of keeping a place for the sale of intoxicating liquors, in violation of the Beal local option law. Dalrymple v. State, 5 C. C. (N.S.) 185, 16 O. C. D. 562.

A fine of $100 on each count of an affidavit charging three separate offenses of keeping a place for the sale of intoxicating liquors, in violation of the Beal local option law, or $300 in the aggregate, is excessive, when there is no charge or claim that defendant had ever been previously convicted of a violation of said law. In such case the entire charge must be treated as charging a first offense, the maximum fine for which is $200. Dalrymple v. State, 5 C. C. (N.S.) 185, 16 O. C. D. 562.

Where the judgment of a lower court in a criminal prosecution is reversed on error because of the imposition of an excessive sentence, the case will be remanded for proper sentence only. Dalrymple v. State, 5 C. C. (N.S.) 185, 16 O. C. D. 562.

The mere facts that exhibits offered in evidence are of considerable bulk or weight does not excuse a failure to attach them to the bill of exceptions or to properly mark them for identification on review on the weight of the evidence.

The failure of a county clerk to sign his certificate attached to the record of a local option election, showing the result to have been that the county was voted "dry" renders the certificate invalid as evidence; but the contention that the county was in fact voted "dry" may be sustained by other evidence.

The evidence of detectives, offered in a prosecution for violation of the Rose county local option law, is governed by the same rules and entitled to the same credence as that of other witnesses under like conditions, and this is particularly true where detectives testify whose compensation is not dependent upon the conviction of the accused; but where the accused is a saloon keeper who operated a saloon prior to the local option election and is charged with continuing to conduct the business in the same manner after the county was voted "dry," his testimony may properly be viewed with caution and measured by his bias in his own favor. State v. Hinkelman, 13 C. C. (N.S.) 321 (affirmed by the supreme court, without opinion, 83 O. S. 446).

Since this section applies only to violations of local option laws, it can not apply to an unlawful sale in wet territory. Rogers v. State, 87 O. S. 308 (reversing Rogers v. State, 14 C. C. (N.S.) 177, 22 O. C. D. 389).

Where two persons enter a place within the limits of "dry" territory, and one of them calls for the drinks, and intoxicating liquor is served to both and is paid for, the offense is complete and prosecution will lie therefor. Accordingly if the other person calls for drinks ten minutes later and intoxicating liquor is served to both and is paid for, another offense is committed for which the seller may be punished. Wheeland v. State, 14 C. C. (N.S.) 334.

It is no objection to the introduction of evidence in a prosecution for the violation of the liquor laws, that such evidence was unlawfully obtained under the search and seizure law. Cohen v. State, 16 C. C. (N.S.) 178.

In a prosecution for the violation of the liquor laws, an affidavit is not bad for duplicity which charges not only that the accused kept and used a wagon for the selling, furnishing and giving away of intoxicating liquors as a beverage, but also that from it he sold, furnished and gave away such liquors. Cohen v. State, 16 C. C. (N.S.) 178.

Under R. S. § 1536-100, subdiv. 5, a municipal corporation has no authority to enact an ordinance to regulate the sale of intoxicating liquors, which does not contain the "regular druggist" exception found in R. S. § 4364-20c (G. C. § 13233). Akron v. Seitz, 18 C. C. (N.S.) 200.

In the prosecution of a druggist for violating the municipal local option law of 1902 (95 O. L. 87), it is not sufficient to charge that he sold intoxicating liquor upon a written prescription and that the sale was not made by him in good faith

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for medicinal purposes, without alleging that it was known to him that the liquor would be used for other than the purpose the prescription called for, or some other fact tending to show that it was not sold in good faith. Rowland v. State, 18 C. C. (N.S.) 598 (affirmed, 80 O. S. 711).

In such a case, where the charge is that the druggist sold the liquor upon a prescription which had been used before, it must also be stated that he knew the prescription had been used before and liquor obtained upon it. In such a case, where the druggist is charged with failure to cancel the prescription upon its first use, it must be stated that it was first used with him. Rowland v. State, 18 C. C. (N.S.) 598 (affirmed, 80 O. S. 711).

Where the legislature has provided, as in R. S. § 4364-20, that the keeping of intoxicating liquors in dry territory in any place except a drug store or private residence shall be prima facie evidence that such liquors are kept for unlawful sale, furnishing or giving away, the burden of proof is changed and a conviction will be sustained upon evidence of this fact alone. Nickels v. State, 22 C. C. (N.S.) 236.

It is a violation of R. S. § 4364-20b (G. C. § 13232) to sell intoxicating liquors, as a beverage, on a boat anchored in the Ohio river opposite the shore of a municipality of this state, with a passageway for persons to and from the bank of said river in said municipality to said boat, after a majority of the voters of the municipality had voted to prohibit the sale of intoxicating liquors therein. State v. Savors, 23 O. C. D. 224.

Where intoxicating liquor is found in considerable quantities in a room rented by the defendant in dry territory, and in which some of his other property was also found, the exception embodied in G. C. § 6102, as to liquor kept in drug stores and bona fide private residences is not applicable, where the room was but six feet wide and eight feet long and was without bed or bedding. Stephens v. State, 24 C. C. (N.S.) 254.

An attorney other than the prosecuting attorney may appear for the prosecution for a violation of this section and may file a reply to a plea in bar. Gilliam v. State, 7 N. P. (N.S.) 482, 53 Bull. 399.

The representative of a wine company who gives away samples of his liquors to be tasted by his prospective purchasers may be convicted under this section. Capple v. State, 4 O. N. P. 339, 17 O. D. 75.

Where an arrest is made without warrant the day after the commission of an offense, a conviction will not be sustained unless such arrest is specially authorized by statute. Munzebrock v. State, 10 Dec. Rep. 277, 19 Bull. 389.

By virtue of the requirements of section 13246, General Code, one who has been convicted before a mayor for a violation of the law prohibiting the sale of intoxicating liquors in a city, which judgment has been affirmed by the common pleas court, must, before filing a petition in error in the court of appeals, obtain leave of that court after good cause shown therefor and within the time limited in said section. Moorey v. State, 6 O. A. R. 462.

In computing the time within which the same must be filed, the language of the statute, "When a reviewing court is not in session," means not in session in the county in which the litigation is pending, unless the court has fixed some other county of the appellate district for the hearing of such cases; and the court of appeals is not to be deemed in session in the county in which the litigation is pending simply because the term of court therein has been formally held open. Moorey v. State, 6 O. A. R. 462.

FORM OF CHARGE.

Keeping a place.

That on the ——— day of ———, 19— (or from the ——— day of ———, 19— until the ——— day of ———, 19—), in the county of ——— and State of Ohio, and in the (city or village) of ——— in said county of ——— and State of Ohio, one E F, then and there being did unlawfully keep a place where intoxicating liquors were then and there kept for sale as a beverage. That the keeping of the said place as aforesaid by the said E F was then and there prohibited and unlawful and contrary to G. C. § 13232.

Sec. 13233. Indictments.

In indictments, affidavits, or information for violation of the next preceding section, it shall not be necessary to state that the required

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number of electors in the municipal corporation petitioned for an election, that such election was held, or that the majority voted in favor of prohibiting the sale as provided by law, but it shall be sufficient to state that the act complained of was prohibited and unlawful. (R. S. § 4364-20e; 95 v. 90.)

Sec. 13234. Selling liquor thirty days after findings of mayor or judge in residence district.

Whoever, after thirty days from the date of the findings of the mayor of a municipal corporation, or a judge of the court of common pleas of the county in which such corporation is situated, that a majority of the qualified electors in a defined residence district within such municipal corporation are in favor of prohibiting the sale of intoxicating liquors as a beverage, or as shown by a copy of such findings as recorded by the clerk of such municipal corporation or council on the records of the council, in such residence district in any manner, directly or indirectly sells, furnishes or gives away or otherwise disposes of intoxicating liquors as a beverage, or keeps or uses a place, structure or vehicle, whether permanent or transient, for such selling, furnishing or giving away or in which or from which intoxicating liquors are so sold, furnished, given away or otherwise disposed of, or, violates any provision of subdivision VII of chapter 15 part second, shall be fined not less than fifty dollars nor more than two hundred dollars, and, for each subsequent offense, shall be fined not less than two hundred dollars nor more than five hundred dollars. (98 v. 71, § 5; R. S. § 4364-30e.)

Although there may have been some vagueness as to the "when" and "where" of the commission of the offense as charged in the affidavits upon which the prosecutions were based, the charge being that the defendants kept certain places from a certain date and at various times until a certain other date, the period being one week, yet the affidavits were good in that they at least charged one offense, and the defendants were not prejudiced by them.

A finding by a jury that intoxicating liquors were sold at retail by a defendant will not be disturbed by a reviewing court, where based on testimony as to the sale of beer and port wine in a place known as a saloon.

In a prosecution under the Jones law, it is not required that the state make proof in the first instance of negative averments in the affidavit. Otte v. State, 9 C. C. (N.S.) 293, 19 O. C. D. 203 (affirmed, 52 W. L. B. 147).

When a motion for leave to file a petition in error is presented to the clerk of the circuit court, within the time prescribed by law, the court will not refuse to allow the petition to be filed on the ground that leave was not obtained within thirty days, when the court was not in session during that time. Miller v. State, 23 C. C. (N.S.) 76.

Where a petition to declare a certain residence district dry territory has been properly filed, with a common pleas judge, a hearing had, and a finding made that the territory is dry, the status of the territory will not be changed by a later finding by a mayor of the municipality that the territory is wet, even though the petition upon which the mayor acted was filed at an earlier date than that upon which the judge acted. Miller v. State, 23 C. C. (N.S.) 76.

The constitution of the state vests in the courts of appeals jurisdiction to review, affirm, modify or reverse the judgment of a mayor of a municipal corporation, in the exercise of the judicial power conferred upon mayors of municipalities by section 6152, General Code of Ohio. Heininger v. Davis, 96 O. S. 205.

Sec. 13235. Same when subsequent offense.

On conviction for a second or subsequent offense under the next preceding section, the court shall order the place where such liquor is sold, furnished or given away for beverage purposes to be abated as a

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nuisance and shall order the person convicted for such subsequent offense to give bond payable to the State of Ohio in the sum of one thousand dollars, with sureties approved by the court, that he will not sell, furnish or give away intoxicating liquors as a beverage in such residence district in violation of law. (98 v. 71, § 5; R. S. 4364-30e.)

Sec. 13236. What allegations are necessary.

In indictments, informations or affidavits for violations of section thirteen thousand two hundred and thirty-four, it shall not be necessary to state that the required number of electors in a residence district of a municipal corporation signed a petition in favor of prohibiting the sale of intoxicating liquors or that there was a public hearing thereon or that a finding was made upon such petition or that a certificate of such findings, with the petition, was transmitted to the clerk or a record made of it by the clerk, as provided by law, but it shall be sufficient to state that the act complained of was in such residence district prohibited and unlawful. (98 v. 73, § 8; R. S. 4364-30h.)

Sec. 13237. Removal of intoxicating liquor from premises after an election prohibiting same.

Whoever, being a retail liquor dealer, or his agent, trafficking in intoxicating liquors in a county, township, municipality or residence district within which an election has been held under a local option law fails to remove or cause to be removed all intoxicating liquor from such place, its appurtenances or dependencies, within thirty days from the date of such election on such petition, if the result thereof is against the sale of intoxicating liquor, shall be fined not less than fifty dollars nor more than two hundred dollars, and for each subsequent offense shall be fined not less than two hundred dollars nor more than five hundred dollars. (98 v. 13, § 5; R. S. 4364-30r.)

FORM OF CHARGE.

Failure to remove liquors.

"That from the ——— day of ———, 19—, to the ——— day of ———, 19—, ——— was a retail liquor dealer in the county of ———, State of Ohio, and was then and there a retail liquor dealer at the time a special election was held under the county local option law, in the county aforesaid, to-wit: On the ——— day of ———, 19—; that the result of the election aforesaid, held on said day, resulted in a majority against the sale of intoxicating liquor within the said county; that more than thirty (30) days have expired since the date of said election; that after said thirty (30) days had expired, to-wit: on the ——— day of ———, 19—, the said ——— had failed to remove, and to cause to be removed, all intoxicating liquor from the place, its appurtenances and dependencies, in which

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said defendant carried on the business of retail liquor dealer at the time aforesaid; that said failure so to remove said intoxicating liquor was then and there prohibited and unlawful and contrary to § 13237 of the General Code, and against the peace and dignity of the State of Ohio.

Sec. 13238. Subsequent offense.

The person convicted of a second or subsequent offense under the next preceding section, shall give bond in the sum of one thousand dollars, payable to the State of Ohio for the use of the county where the action was brought, with sureties approved by the court, that he will not sell, furnish or give away intoxicating liquor as a beverage in violation of any local option law. (98 v. 13, § 5; R. S. 4364-30r.)

Sec. 13239. Druggist selling intoxicating liquors contrary to local option law.

Whoever, being a druggist or pharmacist convicted of selling intoxicating liquor as a beverage contrary to a local option law, sells intoxicating liquor for any purpose, personally or by agent, within two years thereafter in the local option territory in which he has violated such law, or any place in this state where the sale of intoxicating liquor is prohibited, shall be fined not less than two hundred and fifty dollars nor more than five hundred dollars, and, for each subsequent offense shall be fined not less than five hundred dollars nor more than one thousand dollars. (98 v. 16, § 14; R. S. 4364-30za.)

Sec. 13240. Second conviction.

Upon a second conviction for a violation of the next preceding section, the certificate to practice pharmacy of such druggist or pharmacist shall be revoked and the judge or officer convicting him shall so order and send a copy of such order to the secretary of the state board of pharmacy, upon receipt of which such certificate shall forthwith be revoked by such board. (98 v. 16, § 14; R. S. 4364-30za.)

Sec. 13241. Transcript.

A certified transcript from the docket of the mayor or other officer, before whom a druggist, or pharmacist was convicted under the next preceding section, or before whom a physician was convicted under section thirteen thousand two hundred and seventeen or thirteen thousand two hundred and eighteen, shall be sufficient evidence of such conviction. (98 v. 16, § 14; R. S. 4364-30za.)

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Sec. 13242. Duties of druggist in relation to intoxicating liquors.

Whoever, being a retail druggist or pharmacist in a county, township, municipal corporation or residence district, in which the sale of intoxicating liquor as a beverage is prohibited, fails to keep the book required by law in which is entered at the time of each sale of intoxicating liquor, the date thereof, the name and signature of the purchaser, the kind, quantity and price of such liquor, the purpose for which it was sold, and the residence by street and number of such purchaser, if there be such residence, or fails, if such sale is for medicinal purposes, to enter the name of the physician issuing the prescription, and cancel such prescription by writing the word "cancelled" thereon, and the date on which it was presented and filled or fails or refuses to make any entry in such books required by law, or destroys, alters, or changes an entry therein or such prescription, or sells intoxicating liquor for medicinal purposes except on written prescription, shall be fined not less than fifty dollars nor more than five hundred dollars. (98 v. 16, § 15; R. S. 4364-30zb.)

In the prosecution of a druggist for violating the municipal local option law of 1902 (95 O. L. 87), it is not sufficient to charge that he sold intoxicating liquor upon a written prescription and that the sale was not made by him in good faith for medicinal purposes, without alleging that it was known to him that the liquor would be used for other than the purpose the prescription called for, or some other fact tending to show that it was not sold in good faith. Rowland v. State, 18 C. C. (N.S.) 598 (affirmed, 80 O. S. 711).

In such a case, where the charge is that the druggist sold the liquor upon a prescription which has been used before, it must also be stated that he knew the prescription had been used before and liquor obtained upon it. In such a case, where the druggist is charged with failure to cancel the prescription upon its first use, it must be stated that it was first used with him. Rowland v. State, 18 C. C. (N.S.) 598 (affirmed, 80 O. S. 711).

FORM OF CHARGE.

Retail druggist selling unlawfully.

That on or about the ——— day of ———, A. D. 19— in the county of ———, State of Ohio, in which the sale of intoxicating liquor as a beverage was then and there prohibited, one ——— being then and there a regular druggist and pharmacist, did then and there sell intoxicating liquor upon prescription to one ———.

That the said ——— did not then and there make any record in a book of said sale to the said ———, as required by law.

That said act was then and there prohibited, and unlawful and contrary to G. C. § 13242, and against the peace and dignity of the State of Ohio.

Sec. 13243. When hearing must take place.

When a prosecution is commenced before a court or magistrate for the violation of a law prohibiting the sale of intoxicating liquors as a

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beverage and the liquors seized by virtue thereof are to be used as evidence in such trial, such trial must take place in not more than thirty days. If at the time appointed for such trial, the returns have not been properly made, or for other sufficient cause, the trial is postponed to a further date, it shall not be continued more than fifteen days beyond such thirty days. (98 v. 17, § 17; R. S. § 4364-30zd.)

In a prosecution which comes within the principle of § 13243, a discretion is given the trial judge to continue the case beyond the thirtieth day, and jurisdiction of the case is not lost by so doing. Carmack v. State, 13 C. C. (N.S.) 362, 22 O. C. D. 46 (motion for leave overruled, 8 O. L. R. 107).

Sec. 13244. Common pleas and probate court shall have final jurisdiction.

A common pleas or probate judge with whom an affidavit is filed charging the violation of a local option law prohibiting the sale of intoxicating liquors as a beverage, when the offense is alleged to have been committed in the county in which such judge may be sitting, shall have final jurisdiction to try such case upon such affidavit without a jury unless imprisonment is a part of the penalty. (98 v. 17, § 18; R. S. § 4364-30ze.)

Sec. 13245. Indictment not necessary.

In cases under sections thirteen thousand two hundred and sixteen, thirteen thousand two hundred and seventeen, thirteen thousand two hundred and eighteen, thirteen thousand two hundred and thirty-seven, thirteen thousand two hundred and thirty-nine, or thirteen thousand two hundred and forty-two, it shall not be necessary that information be filed by the prosecuting attorney or that an indictment be found by the grand jury. (98 v. 17, § 18; R. S. § 4364-30ze.)

In prosecutions begun in the probate court, under favor of G. C. §§ 13195 and 13225, information must be filed by the prosecuting attorney in accordance with G. C. § 13441, before the probate court has jurisdiction to try such prosecutions. Rogers v. State, 87 O. S. 308 (reversing 22 O. C. D. 389).

Sec. 13246. Petition in error.

A petition in error shall not be filed in a court to reverse a conviction for violation of a law prohibiting the sale of intoxicating liquors in a territory or district or to reverse a judgment affirming such conviction except after leave granted by the reviewing court. Such leave shall not be granted except for good cause shown at a hearing of which

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counsel for the complainant in the original case shall have had actual and reasonable notice. Such petition in error must be filed not more than thirty days after the judgment complained of, and the case shall be heard by such reviewing court within thirty court days from such filing. When a reviewing court is not in session within the time provided for, the motion for leave to file petition in error and the petition in error may be filed with and heard by such reviewing court within ten days after it is in session. This section shall not confer a right of review in such cases in addition to that which is now provided by law. (98 v. 18, §§ 20, 21; 99 v. 475, § 21a; R. S. § 4364-30zg-30zh.)

An attorney other than the prosecuting attorney may prosecute a violation of the Beal law and may also appear in proceedings in error to such a prosecution. Gilliam v. State, 7 N. P. (N.S.) 482, 19 O. D. 132.

This statute is mandatory to the extent that good cause must be shown before a court will be authorized to grant leave to file a petition in error. Gilliam v. State, 7 N. P. (N.S.) 482, 19 O. D. 132.

Where the judgment of a lower court in a criminal prosecution is reversed on error because of the imposition of an excessive sentence, the case will be remanded for proper sentence only. Dalrymple v. State, 5 C. C. (N.S.) 185, 16 O. C. D. 562.

The specific provisions of R. S. §§ 4364-30zg and 4364-30zh (G. C. § 13246), control the prosecution of error proceedings brought to reverse a conviction for violation of any law prohibiting the sale of intoxicating liquors in any territory or district, or to reverse any judgment affirming such conviction, notwithstanding such provisions are inconsistent with more general provisions of other sections of the Revised Statutes. Mitchell v. State, 78 O. S. 347.

By force of the provisions of the above cited sections the allowance by one judge of the circuit court of a motion for leave to file a petition in error to reverse a judgment of the court of common pleas affirming a judgment of conviction for violation of any law prohibiting the sale of intoxicating liquors, does not give to such court jurisdiction to try and determine the errors complained of. Mitchell v. State, 78 O. S. 347.

Under the provisions of R. S. § 7356 (G. C. § 13751), it is competent for the circuit court in the first instance to take and entertain jurisdiction of proceedings in error to review the judgment of the mayor of an incorporated village convicting the defendant of a crime. State v. Mattingly, 79 O. S. 79.

For the purpose of such review, under the provisions of section twenty (§ 20) of the act of the general assembly entitled, "An act to provide for the enforcement of local option laws prohibiting the sale of intoxicating liquors as a beverage," passed February 23, 1906 (98 O. L. 12), the circuit court may grant leave to the convicted party to file a petition in error therein to review the judgment of conviction. State v. Mattingly, 79 O. S. 79.

When a motion for leave to file a petition in error is presented to the clerk of the circuit court, within the time prescribed by law, the court will not refuse to allow the petition to be filed on the ground that leave was not obtained within thirty days, when the court was not in session during that time. Miller v. State, 23 C. C. (N.S.) 76.

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The provisions of this section requiring the granting of leave by the reviewing court before a petition in error shall be filed to reverse a conviction for violation of a law prohibiting a sale of intoxicating liquors in a territory or district, do not apply to a conviction under G. C. § 13223. Cannon v. State, 89 O. S. 469 (approving and following Rogers v. State, 87 O. S. 308).

Where one who has been tried and convicted before a magistrate for violation of the law against the sale of intoxicating liquors applies to the court of common pleas for leave to file a petition in error to review the proceedings and judgment of the magistrate, and the court to whom the applicant is made refuses to grant leave to file a petition in error, such refusal is not reviewable on error in the court of appeals. Deniel v. State, 1 O. A. R. 131, 18 C. C. (N.S.) 275, 24 O. C. D. 287.

By virtue of the requirements of section 13246, General Code, one who has been convicted before a mayor for a violation of the law prohibiting the sale of intoxicating liquors in a city, which judgment has been affirmed by the common pleas court, must, before filing a petition in error in the court of appeals, obtain leave of that court after good cause shown therefor and within the time limited in said section. Moorey v. State, 6 O. A. R. 462.

In computing the time within which the same must be filed, the language of the statute, "When a reviewing court is not in session," means not in session in the county in which the litigation is pending, unless the court has fixed some other county of the appellate district for the hearing of such cases; and the court of appeals is not to be deemed in session in the county in which the litigation is pending simply because the term of court therein has been formally held open. Moorey v. State, 6 O. A. R. 462.

Sec. 13247. Fines and forfeited bonds.

Fines and forfeited bonds collected under this subdivision of this chapter, except as provided in section thirteen thousand two hundred and thirty-one, if enforced in the county court; shall be paid into the county treasury, and, if enforced in municipal courts, shall be paid into the treasury of the municipal corporation in which the cause was tried. Such funds paid into the treasury of the municipal corporation shall be applied as the council thereof may direct. (99 v. 37, § 7; 99 v. 475, § 21a; 98 v. 74, § 10; R. S. § 4364-20g.)

The council of a village in a "dry" county may provide that a part of the fines and forfeited bonds paid into the village treasury by violators of the local option laws shall constitute a special fund for the employment of detectives and attorneys to prosecute violators of said laws. Powell v. Ashville, 11 N. P. (N.S.) 369.

Fines received by the clerk of the court of common pleas from persons indicted and convicted in that court for violation of G. C. § 13050, et seq., punishing the sale of liquor on Sunday, or for violation of the municipal local option law, must under G. C. § 12378 be paid by him into the county treasury. Mount Vernon v. Mochwart, 75 O. S. 529.

Fines imposed by a municipal court against persons prosecuted and convicted for a violation of either G. C. § 13050, et seq., or the municipal local option law, must, when collected, be paid into the treasury of the municipal corporation wherein such fine was imposed, agreeably to the provisions of this section. Mount Vernon v. Mochwart, 75 O. S. 529.

Sec. 13248. Costs.

Costs arising as a result of an affidavit duly filed and warrant issued under this chapter or subdivision VIII of chapter 15 part second, whereby liquors, vessels and furniture are seized, shall be taxed with the costs in the trial for the violation of the local option law. (99 v. 475, § 21a.)

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Sec. 13249. Lien on real estate for fines and forfeited bonds.

Fines and forfeited bonds resulting from a violation of sections thirteen thousand two hundred and sixteen, thirteen thousand two hundred and seventeen, thirteen thousand two hundred and eighteen, thirteen thousand two hundred and thirty-seven, thirteen thousand two hundred and thirty-eight, thirteen thousand two hundred and thirty-nine, thirteen thousand two hundred and forty or thirteen thousand two hundred and forty-two shall attach and operate as a lien upon the real property on or in which such unlawful act was committed. (98 v. 17, § 19; R. S. § 4364-30zf.)

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CHAPTER XVIII.

OFFENSES RELATING TO ELECTIONS.

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ILLEGAL VOTING.

Sec. 13250. Voting more than once at same election.

Whoever votes or attempts to vote more than once at the same election shall be imprisoned in the penitentiary not less than one year nor more than five years. (R. S. § 7050; 39 v. 13, § 6; 98 v. 226; S. & C. 544.)

An indictment which was claimed to be under R. S. § 7050, for illegal voting, was held to be fatally defective, in failing to designate the election at which the defendant voted. Lane v. State, 39 O. S. 312.

A prosecution for illegal voting at a primary election must be brought under G. C. § 13325 and not under this section. State v. Volkopf, 8 O. D. 687.

FORM OF CHARGE.

Voting more than once at an election.

At the township of ———, in the county of ——— aforesaid, did unlawfully, willfully, and knowingly vote more than once, to-wit: twice, at a certain election (set out what election was held), said election then and there being duly holden and authorized to be holden by the laws of this state.

Sec. 13251. Voting without one year's residence.

Whoever votes at an election, not having been a resident of this state for one year next preceding such election, shall be imprisoned not less than one month nor more than six months. (R. S. § 7051; 39 v. 13, § 8; S. & C. 544.)

FORM OF CHARGE.

Voting, not having resided a year in the state.

At the township of ———, in the county of ———, aforesaid, did unlawfully, willfully and knowingly vote at a certain election (set out what election was held), said election then and there being holden and authorized by the laws of this state to be holden, he, the said E F, then and there not having been a resident of the said State of Ohio for one year immediately preceding said election so as aforesaid held.

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Sec. 13252. Voting, a resident of another state.

Whoever, being a resident of another state, votes or attempts to vote at an election in this state, shall be imprisoned in the penitentiary not less than one year nor more than five years. (R. S. § 7049; 39 v. 13, § 7; 98 v. 226; S. & C. 544.)

FORM OF CHARGE.

A non-resident of the state voting.

At the township of ———, in the county of ———, aforesaid, unlawfully, willfully, and knowingly did vote at a certain election (set out what election was held), said election then and there being duly holden and authorized by the law of this state to be holden; he, the said E F, then and there being a resident of another state, to-wit: of the State of ———, and not a resident of the said State of Ohio.

Sec. 13253. Voting, not a resident of the county thirty days.

Whoever, being a resident of this state, votes in a county in which he has not been an actual resident for thirty days next preceding the election, shall be imprisoned in the penitentiary not less than one year nor more than three years. (R. S. § 7048; 65 v. 100, § 5; S. & C. 544; S. & S. 342.)

FORM OF CHARGE.

Voting out of one's own county.

Being then a resident of the State of Ohio, did come into the aforesaid county of ———, in the State of Ohio, and, afterward, to-wit: on the ——— day of ———, in the year aforesaid, at the township of ———, in the county of ——— aforesaid, unlawfully, willfully, and knowingly did vote at a certain election (set out what election was held), said election then and there being duly holden and authorized to be holden by the laws of this state; he, the said E F, being then and there not a resident of the said county of ——— for thirty days next previous to said election.

Sec. 13254. Voting, not a resident of the precinct twenty days.

Whoever votes at an election in a precinct into which he has come for temporary purposes, or, being an unmarried man, has not resided therein for twenty days next preceding such election, shall be fined not more than five hundred dollars or imprisoned not less than three months nor more than six months. (R. S. § 7047; 73 v. 155, § 4; S. & C. 544; S. & S. 342.)

A dismissal under this section is no bar to a prosecution for violation of § 2926w—3 (repealed, 97 O. L. 239), at the same election; there are two offenses contemplated, one under the general election law, the other under the registration law. *In re* Donahue, 4 N. P. 296; 6 O. D. 389.

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FORMS OF CHARGES.

Voting out of one's own township.

At the township of ———, in the county aforesaid, he, the said E F, not having then resided twenty days in said township of ———, nor any length of time in said township, but being then actually a resident of a certain other township in the county aforesaid, to-wit: of the township of ———, in said county, unlawfully and willfully and knowingly did vote in the said township of ———, at a certain election then and there being duly held (set out what election was held), and which said election was then and there duly authorized by the laws of this state.

Voting out of one's own ward.

At the ——— ward, in the city of ———, in the county of ———, aforesaid, did unlawfully, willfully, and knowingly vote at a certain election then and there being duly held (set out what election was held), in which ——— ward, he, the said E F, had not then actually resided for twenty days, nor for any time, next preceding said election, but then resided in a certain other ward, to-wit: in the ——— ward, in the city and county aforesaid; which said election then and there being held in said ——— ward as aforesaid, was duly authorized by the laws of this state.

Sec. 13255. Voting, not being twenty-one years of age.

Whoever votes at an election, knowing that he is not twenty-one years of age, shall be imprisoned not less than one month nor more than six months. (R. S. § 7051; 39 v. 13, § 8; S. & C. 544.)

FORM OF CHARGE.

Voting under twenty-one years of age.

At the November election, 19—, the said E F then and there not being of the age of twenty-one years, but of the age of ——— years, as the said E F then and there well knew, and well knew that he was not then and there duly qualified to vote at said election by reason thereof, and the said E F did then and there unlawfully, wilfully and knowingly vote at said election for the officers to be elected thereat.

Sec. 13256. Voting, not being a citizen.

Whoever votes at an election, knowing that he is not a citizen of the United States, shall be imprisoned not less than one month nor more than six months. (R. S. § 7051; 39 v. 13, § 8; S. & C. 544.)

Upon an indictment for voting at an election without being a citizen of the United States it is sufficient to prove that the defendant is a foreigner by birth and that he deposited a ballot, without showing that he voted for any person. State v. McGinly, 2 Dec. Rep. 398.

FORM OF CHARGE.

Voting, not being a citizen of the United States.

At the November election, 19—, the said E F then and there not being a citizen of the United States, but a citizen of ———, as the said E F then and there well knew, and well knew that he was not then and there duly qualified to vote at said election by reason thereof, and the said E F did then and there unlawfully, wilfully and knowingly vote at said election for the officers to be elected thereat.

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Sec. 13257. Voting, being under conviction of crime.

Whoever, being disqualified by conviction of crime and not restored to all the rights of a citizen, votes at an election, shall be imprisoned not less than one month nor more than six months. (R. S. § 7051; 39 v. 13, § 8; S. & C. 544.)

Sec. 13258. Voting by impersonating another.

Whoever impersonates another person, real or fictitious, living or dead, and votes or attempts to vote at an election as an elector in the name of such person, shall be imprisoned in the penitentiary not less than two years nor more than five years. (R. S. § 7055; 67 v. 52, § 21; 98 v. 226; S. & C. 546.)

FORM OF CHARGE.

Impersonating another at an election.

At the November election, 19—, duly holden under the laws of the State of Ohio, the said E F then and there did represent to the judges of said election that he was one M N, and did then and there impersonate the said M N, well knowing the said M N then and there to be dead, and at said election did attempt to vote and did vote for the officers to be elected thereat as an elector in the name of the said M N, and then and there did wilfully, unlawfully and knowingly impersonate the said M N and unlawfully, wilfully and knowingly did attempt to vote and did vote at said election as an elector in the name of the said M N.

PROCURING ILLEGAL VOTE.

Sec. 13259. Non-resident of state.

Whoever counsels or advises another to vote at an election, knowing that he has not been a resident of this state for one year next preceding such election, shall be fined not less than one hundred dollars nor more than five hundred dollars and imprisoned not less than one month nor more than six months. (R. S. § 7052; 39 v. 13, § 9; S. & C. 544.)

Sec. 13260. Non-resident of county.

Whoever procures, aids, assists, counsels or advises another person to go or come into a county for the purpose of voting therein, knowing that such person is not qualified to vote therein, shall be imprisoned in the penitentiary not less than one year nor more than five years. (R. S. § 7053; 39 v. 13, § 10; S. & C. 544.)

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FORM OF CHARGE.

Procuring a person to go into another county to vote.

That on the ——— day of ———, in the year of our Lord one thousand nine hundred and ———, the same day being the second Tuesday in October in said year (or a day of some other general election, state it according to the fact), an election was duly holden in the several townships and counties of the said State of Ohio (set out what election was held), the same being authorized by the laws of the State of Ohio so to be holden; and the said C D, of the county of ———, in the said State of Ohio, on the said ——— day of ———, in the year of our Lord one thousand nine hundred and ———, unlawfully, wilfully, and knowingly did come from the aforesaid county of ———, into the county of ——— aforesaid, for the purpose then and there of unlawfully and fraudulently giving his vote in the said county of ———, at the election aforesaid, he, the said C D, then not being a resident of the said county of ———, but being a resident of the county of ——— aforesaid; and the jurors aforesaid, upon their oaths and affirmations aforesaid, further say that one E F, him, the said C D, then and there, to-wit, on the said ——— day of ———, in the year aforesaid, at the county of ——— aforesaid, unlawfully and wilfully did aid, assist, procure, counsel, and advise, in manner and form aforesaid, to come from the said county of ——— into the said county of ———, for the purpose then and there of giving his vote in the said county of ———, he, the said E F, then and there well knowing that the said C D was then and there not duly qualified to vote in said county of ———, and then and there well knowing that the said C D was then not a resident of said county of ———, but that the said C D was then a resident of the aforesaid county of ———, in the said State of Ohio.

Sec. 13261. Not of legal age.

Whoever counsels or advises another person to vote at an election, knowing that at the time of such election such person is not twenty-one years of age, shall be fined not less than one hundred dollars nor more than five hundred dollars or imprisoned not less than one month nor more than six months. (R. S. § 7052; 39 v. 13, § 9; S. & C. 544.)

Sec. 13262. Not a United States citizen.

Whoever counsels or advises another person to vote at an election, knowing that such person is not a citizen of the United States, shall be fined not less than one hundred dollars nor more than five hundred dollars or imprisoned not less than one month nor more than six months. (R. S. § 7052; 39 v. 13, § 9; S. & C. 544.)

Sec. 13263. Other disabilities.

Whoever counsels or advises another person to vote at an election, knowing that by reason of any disability other than those named in the next four preceding sections, such person is not duly qualified to vote at the place where and time when such vote is to be given, shall be fined not less than one hundred dollars nor more than five hundred dollars

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or imprisoned not less than one month nor more than six months. (R. S. § 7052; 39 v. 13, § 9; S. & C. 544.)

FORM OF CHARGE.

Aiding and counseling illegal voting.

(Here set forth a regular charge either for voting, not having resided in the state a year next preceding the election; or for voting while being under age; or for voting not being a citizen of the United States; or for voting while being disqualified for some other reason, and then proceed thus:—and the jurors aforesaid, upon their oaths and affirmations aforesaid, further say that one E F, then and there on the said ——— day of ———, in the year of our Lord one thousand nine hundred and ———, at the township of ———, aforesaid, unlawfully, wilfully, and knowingly did counsel and advise him, the said C D, then and there, in manner and form aforesaid, unlawfully to give his vote, and then and there the offense aforesaid, in manner and form aforesaid, to commit; he, the said E F, then and there well knowing that (here set forth the fact).

BALLOTS.

Sec. 13264. Putting a fraudulent ballot in box.

Whoever, either before or after proclamation is made at the opening of the polls, fraudulently puts a ballot or ticket into the ballot-box, shall be imprisoned in the penitentiary not less than two years nor more than five years. (R. S. § 7055; 67 v. 52, § 21; 93 v. 226; S. & C. 546.)

The provisions of the "corrupt practices act" (repealed, 95 O. L. 77), which direct the commencement of an action by the prosecuting attorney, at the instance of the attorney-general, for the purpose of inquiring into the title to an office of a successful candidate who is charged with acts made unlawful by any law of this state, and which authorize the court, upon finding any of such charges true, to render judgment declaring the election void, the office vacant, and excluding the incumbent therefrom, or not in conflict with the constitution, and are valid. Mason v. State, ex rel., 58 O. S. 30.

Under the "corrupt practices act" an application to the attorney-general asking for the the institution of proceedings against a public officer, could be made only by persons entitled to vote at the election at which the candidate whose office is to be affected by the proceeding was elected. State v. McFillan, 14 C. C. 407, 7 O. C. D. 587.

FORMS OF CHARGES.

Fraudulently depositing a ballot in a ballot-box.

That on the ——— day of ———, in the year of our Lord one thousand nine hundred and ———, at the township of ———, in the county of ——— aforesaid, a certain election was duly holden (set out what election was held), the same being authorized by the laws of the State of Ohio, and that one E F, then and there after proclamation of the opening of the polls was then and there at said election duly made, unlawfully and fraudulently, did put a ballot and ticket into a ballot-box of said election, then and there being held as aforesaid; upon which said ballot and ticket was printed the name of C D for the office of ———, and the name of G H for the office of (etc., giving in the same manner all the names on the ticket), with intent thereby unlawfully and fraudulently to influence and affect the result of said election.

Judge of election secretly depositing a ballot in the ballot-box.

That on the ——— day of ———, in the year of our Lord one thousand nine hundred and ———, at the township of ———, in the county of ——— aforesaid, a certain election was duly holden (set out what election was held), the same being authorized by the laws of the State of Ohio, at which said election in the township aforesaid one E F then and there acted as one of the judges of said

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election; and that the said E F, then and there, after proclamation had been duly made of the opening of the polls of said election, did unlawfully and fraudulently put a certain ballot and ticket into the ballot-box at said election, on which said ballot and ticket then and there were printed the names of divers candidates to the jurors aforesaid unknown (or, if known, state them) for the several offices aforesaid, with intent thereby to influence and affect the result of said election in an unlawful and fraudulent manner; he, the said E F, then and there at the time of so as aforesaid putting the said ticket and ballot into the ballot-box as aforesaid, being one of the judges of said election, and then and there acting as such.

Sec. 13265. Voting ballot other than official.

Whoever, knowingly votes or attempts to vote a ballot other than an official ballot lawfully obtained by him, shall be fined not less than two hundred and fifty dollars nor more than one thousand dollars, or imprisoned not less than thirty days nor more than six months, or both. (89 v. 449, § 26; R. S. § 7063; 71 v. 31, § 2; 65 v. 138, § 3; S. & S. 343.)

Sec. 13266. Fraudulently changing a ballot of an elector.

Whoever fraudulently or deceitfully changes a ballot of an elector, by which such elector is prevented from voting for such candidate as he intends to do, shall be imprisoned in the penitentiary not less than one year nor more than three years. (R. S. § 7054; 39 v. 13, § 12; S. & C. 545.)

FORM OF CHARGE.

Changing ballot.

That on the ——— day of ———, in the year of our Lord one thousand nine hundred and ———, at the township of ———, in the county of ——— aforesaid, an election was duly holden, the same being authorized by the laws of the State of Ohio, for (here set forth what officers the election was held for), and that one M N, then and there being an elector, and then and there having a right and being entitled to vote at the election aforesaid, in the township aforesaid, did then and there have in his possession a certain ballot with the name of O P printed thereon for the office of ———, and the name Q R printed thereon for the office of (etc., giving the names on the ticket and the office for which each one was a candidate), which said ballot he, the said M N, then and there desired and intended to give and cast as his vote at the aforesaid election; and that one E F, then and there well knowing the premises, fraudulently, deceitfully, knowingly, and without the knowledge of the said M N, then and there did change said ballot of the said M N, elector as aforesaid, and in the place thereof did furnish, give, and substitute another ballot, on which said last mentioned ballot then and there was printed the name of C D for the office of (etc., giving the names upon the ballot, and the office for which each was inserted), by which said fraudulent and deceitful change of the aforesaid ballot, the said M N, elector as aforesaid, was then and there prevented from voting for such candidates as he then and there intended and desired.

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Sec. 13267. Illegal marking a ballot.

Whoever, at an election, marks the ballot of an elector or hands a marked ballot to him to vote, with intent to ascertain how he voted, shall be fined not more than fifty dollars and imprisoned not more than ten days. (R. S. § 7063; 65 v. 138, § 3; 71 v. 31, § 2; S. & S. 343.)

Sec. 13268. Inducing an elector to show how he marked his ballot.

Whoever endeavors to induce an elector, after voting at an election, to show how he marked his ballot at such election, shall be fined not less than twenty-five dollars nor more than five hundred dollars or imprisoned in jail not more than six months, or both. (89 v. 450, § 30; 88 v. 464, § 21; R. S. 2966-45.)

Sec. 13269. Elector permitting ballot to be seen.

Whoever, being an elector, allows his ballot to be seen by another except as provided by law, with an apparent intention of letting it be known how he is about to vote, shall be fined not less than twenty-five dollars nor more than five hundred dollars, or imprisoned in jail not more than six months, or both. (89 v. 450, § 30; 88 v. 464, § 21; R. S. 2966-45.)

Sec. 13270. Interfering with an elector when marking his ballot.

Whoever, at an election, interferes or attempts to interfere with an elector when inside the enclosed place or when marking his ballot, shall be fined not less than twenty-five dollars nor more than five hundred dollars or imprisoned in jail not more than six months, or both. (89 v. 450, § 30; 88 v. 464, § 21; R. S. § 2966-45.)

Sec. 13271. Elector marking ballot so as to be identified.

Whoever, being an elector, purposely marks his ballot so it may be identified after it has been cast, shall be fined not less than twenty-five dollars nor more than five hundred dollars or imprisoned in jail not more than six months, or both. (89 v. 450, § 30; 88 v. 464, § 21; R. S. § 2966-45.)

The word "yes" instead of a cross mark in the space to the left of the name of the candidate is not a distinguishing mark which invalidates the ballot. Thompson v. Redington, 92 O. S. 101.

A cross mark to the left of a vacant space upon a ballot is not a distinguishing mark which prevents such ballot from being counted for the candidates whose names appear thereon and for whom the voter evidently intends to vote. Thompson v. Redington, 92 O. S. 101.

Sec. 13272. Elector making false statement as to inability to mark ballot.

Whoever, being an elector, makes a false statement as to his inability to mark his ballot, shall be fined not less than twenty-five dollars nor more than five hundred dollars or imprisoned in jail not more than six months, or both. (89 v. 450, § 30; 88 v. 464, § 21; R. S. § 2966-45.)

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Sec. 13273. Having in possession a ballot illegally obtained.

Whoever knowingly has in his possession an official ballot illegally obtained shall be fined not less than two hundred and fifty dollars nor more than one thousand dollars, or imprisoned not less than thirty days nor more than six months, or both. (89 v. 449, § 26; 88 v. 465, § 22; R. S. 2966-41.)

Sec. 13274. Election officer deceiving an elector in marking his ballot.

Whoever, being an election officer, deceives an elector in marking his ballot, or marks it other than he is lawfully requested to do by such elector, shall be fined not less than twenty-five dollars nor more than five hundred dollars or imprisoned in jail not more than six months, or both. (89 v. 450, § 30; 88 v. 464, § 21; R. S. 2966-45.)

Sec. 13275. Forging official endorsement on ballot.

Whoever forges or falsely makes the official endorsement on a ballot shall be fined not less than one hundred dollars nor more than one thousand dollars or imprisoned in jail not more than one year, or both. (89 v. 449, § 28; 88 v. 464, § 21; R. S. 2966-43.)

Sec. 13276. Tearing down, etc., specimen ballot, etc.

Whoever wilfully defaces, tears down, removes or destroys a card of instruction or specimen ballot posted for the instruction of voters shall be fined not less than one hundred dollars nor more than one thousand dollars or imprisoned in jail not more than one year, or both. (89 v. 449, § 28; 88 v. 464, § 21; R. S. 2966-43.)

Sec. 13277. Destroying lawful ballot.

Whoever wilfully destroys or defaces a lawful ballot shall be fined not less than one hundred dollars nor more than one thousand dollars or imprisoned in jail not more than one year, or both. (89 v. 449, § 28; 88 v. 464, § 21; R. S. 2966-43.)

Sec. 13278. Removing ballot outside of enclosure.

Whoever takes, removes or is found in possession of a lawful ballot outside of the enclosure provided for voting, before the polls have been closed, shall be fined not less than one hundred dollars, nor more than one thousand dollars or imprisoned in jail not more than one year, or both. (89 v. 449, § 28; 88 v. 464, § 21; R. S. 2966-43.)

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Sec. 13279. Delaying delivery of ballot.

Whoever wilfully hinders or delays the delivery of a lawful ballot to a person entitled to receive it shall be fined not less than one hundred dollars nor more than one thousand dollars or imprisoned in jail not more than one year, or both. (89 v. 449, § 28; 88 v. 464, § 21; R. S. 2966-43.)

Sec. 13280. Distributing an unlawful ballot.

Whoever distributes to an elector a ballot printed or written contrary to the provisions of law shall be fined not more than fifty dollars and imprisoned not more than ten days. (R. S. § 7063; 65 v. 138, § 3; 71 v. 31, § 2; S. & S. 343.)

Sec. 13281. Printing an unlawful ballot.

Whoever prints for distribution a ballot contrary to the provisions of law shall be fined not more than fifty dollars and imprisoned not more than ten days. (R. S. § 7063; 65 v. 138, § 3; 71 v. 31, § 2; S. & S. 343.)

Sec. 13282. Further offenses pertaining to printing of ballots.

Whoever, being employed to print or engaged in printing the official ballot, prints or causes or permits to be printed, an official ballot other than according to the copy furnished him by the clerk of the board of elections or such board, or a false or fraudulent ballot, or appropriates, gives, delivers or knowingly permits to be taken away any of such ballots by a person other than such clerk or board, or wilfully seals up, or causes or permits to be sealed up or delivers to such clerk or board, a less number of ballots than the number endorsed thereon, shall be fined not less than two hundred and fifty dollars nor more than one thousand dollars or imprisoned not less than thirty days nor more than six months, or both. (89 v. 449, § 26; 88 v. 465, § 22; R. S. 2966-41.)

Sec. 13283. Offenses pertaining to custody or delivery of ballots, blanks, poll-books, cards of instruction, etc.

Whoever, being a judge or clerk of election, printer or other person entrusted with the custody or delivery of ballots, blanks, poll-books, cards of instruction or other required papers, unlawfully opens or permits to be opened a sealed package containing ballots, or gives or delivers to another not lawfully entitled thereto, or unlawfully misplaces or carries away, or negligently loses or permits to be taken from him

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or fails to deliver, or, except as by law provided, destroys such package of ballots, or a ballot, poll-book, card of instruction or other required paper, shall be fined not less than one hundred dollars nor more than one thousand dollars or imprisoned in jail not more than one year, or both. (89 v. 449, § 27; 88 v. 464, § 21; R. S. 2966-42.)

JUDGES AND CLERKS.

Sec. 13284. Judges of election knowingly counting fraudulent votes.

Whoever, being a judge of election, knowingly permits a ballot or ticket, fraudulently placed in a ballot-box, if it can be designated, to be counted with the legal votes cast at such election, shall be imprisoned in the penitentiary not less than one year nor more than three years. (R. S. § 7057; 67 v. 52, § 21.)

FORM OF CHARGE.

Unlawfully, wilfully, and knowingly counting ballot unlawfully and fraudulently deposited in ballot-box.

(Set out a charge of fraudulent voting [§§ 13258 or 13264], and then add:) That said ballot so unlawfully and fraudulently deposited by the said E F in said ballot-box as aforesaid could be designated from the other ballots cast at said election by (set out how the ballot could be designated); that M N, O P, and R S, being then and there the judges at said election, unlawfully, wilfully, and knowingly did count said ballot so unlawfully and fraudulently deposited in said ballot-box by the said E F as aforesaid.

Sec. 13285. Judges postponing counting, adjourning or removing ballot box.

Whoever, being a judge of election, after the counting of votes commences as required by law, postpones the counting of such votes, adjourns for any time or to any place, or removes the ballot-box from the place of voting or the custody or presence of all the judges of such election, shall be fined not less than one hundred dollars, nor more than one thousand dollars and imprisoned not more than ten days. (R. S. § 7056; 69 v. 58, §§ 1, 2.)

FORM OF CHARGE.

Judges postponing counting.

That on the ——— day of ———, A. D. 19—, at the township of ———, in the county of ——— aforesaid, a certain election was holden (set out what election was held), the same being authorized by the laws of the State of Ohio, at which said election in the township aforesaid, C D, E F, and G H, then and there, acted as the judges of said election; that the said C D, E F, and G H, then and there, after closing of the polls of said election, and after the counting of the votes cast at said election had been commenced as required by law, unlawfully and wilfully did cease the counting of said votes, and unlawfully and wilfully did postpone the counting of said votes.

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Sec. 13286. Judges permitting ballots in box at opening of polls.

Whoever, being a judge of election, permits a ballot or ticket to remain or be in the ballot-box at the opening of the polls, or be put therein during the receiving, counting and certifying the ballots, except when lawfully presented by an elector during an election, shall be imprisoned in the penitentiary not less than two years nor more than five years. (R. S. § 2926w; 83 v. 226; 97 v. 214; 98 v. 223.)

Sec. 13287. Judge refusing to take oath.

Whoever, being a judge of an election, refuses to take the oath prescribed by law, shall be fined not less than three hundred dollars nor more than one thousand dollars and imprisoned not less than three months nor more than six months. (R. S. § 7058; 73 v. 157; 77 v. 267; S. & C. 547.)

Sec. 13288. Judge refusing to administer oath.

Whoever, being a judge of an election, refuses or sanctions the refusal of another judge of such election to administer an oath required by law, shall be fined not less than three hundred dollars nor more than one thousand dollars and imprisoned not less than three months nor more than six months. (R. S. § 7058; 73 v. 157; 77 v. 267; S. & C. 547.)

Sec. 13289. Judge refusing lawful ballot.

Whoever, being a judge of an election, refuses to receive or sanctions the rejection of a ballot from a person, knowing him to have the lawful qualifications of an elector, shall be fined not less than three hundred dollars nor more than one thousand dollars and imprisoned not less than three months nor more than six months. (R. S. § 7058; 73 v. 157; 77 v. 267; S. & C. 547.)

The act of April 16, 1868 (65 O. L. 97), "supplementary to the act entitled 'an act to preserve the purity of elections,' passed March 20, 1841, and to protect the judges of elections in the discharge of their duties;" and also the last clause in the proviso in § 3 of the act of April 17, 1868 (65 O. L. 100-104), "to amend §§ 2, 4, 5 and 24 of the act entitled 'an act to preserve the purity of elections,' passed March 20, 1841," etc., providing that clerks and judges of elections shall not be liable for damages for rejecting the votes of persons having a visible admixture of African blood, are in their spirit, scope, and effect calculated to impede, and in a great measure to defeat the exercise of the right of suffrage by legal voters having such visible admixture of African blood, by imposing upon them unreasonable burdens of proof, and limitations as to kind and amount of evidence required of them; by impliedly authorizing the unconditional rejection of their votes; by denying to them the same right of action which is accorded to others for the violation of their right; and by discriminating against them, and in favor of other classes of voters, as to punishment and penalties for a violation of the election laws; and are therefore unconstitutional and void. Monroe et al., v. Collins, 17 O. S. 665.

Sec. 13290. Judge refusing candidate or friends admission to polls.

Whoever, being a judge of an election, upon lawful request therefor, refuses to permit the respective candidates or not more than three friends of each thereof, to be present at such election in the room with the judges during the time of receiving and counting the ballots, shall be fined not less than three hundred dollars nor more than one thousand dollars and imprisoned not less than three months nor more than six months. (R. S. § 7058; 73 v. 157; 77 v. 267; S. & C. 547.)

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Sec. 13291. Judge of election receiving unlawful vote.

Whoever, being a judge of an election knowingly receives or sanctions the reception of a ballot from a person not an elector as prescribed by law, or receives or sanctions the reception of a ballot from a person refusing to answer a question in accordance with the laws relating to elections, shall be fined not less than three hundred dollars nor more than one thousand dollars and imprisoned not less than three months nor more than six months. (R. S. § 7058; 73 v. 157; 77 v. 267; S. & C. 547.)

FORMS OF CHARGES.

Receiving an illegal vote:

That on the ——— day of ———, in the year of our Lord one thousand nine hundred and ———, in the township of ———, in the county of ——— aforesaid, an election was duly holden (set out what election was held), the same being authorized by the laws of the State of Ohio, at which said election E F, C D and S T then and there acted as judges of said election, being duly empowered and legally authorized to act as said judges, and that one A B then and there appeared in person at the polls of said election, at a time on said day when the polls of said election were open according to law, and then and there offered his vote at said election to the aforesaid judges thereof, he, the said A B, then and there not being a resident of the said State of Ohio, but was then and there a resident of the State of ——— (or was disqualified to vote for some cause, stating it), and then and there not having all the qualifications of an elector prescribed by the act entitled "an act to preserve the purity of elections," passed by the general assembly of the said State of Ohio; and that the said E F, one of the judges as aforesaid, then and there of the election aforesaid, then and there well knowing that the said A B was then and there not a resident of the said State of Ohio, but that the said A B was then and there a resident of another state, to-wit, the State of ———, and then and there well knowing that the said A B was then and there a person not having all the qualifications of an elector, prescribed by the aforesaid act, did then and there, unlawfully, fraudulently, and knowingly receive the aforesaid vote of and from him, the said A B, as and for a good and legal vote; and the jurors aforesaid, upon their oaths and affirmations aforesaid, further say that the said C D, being then and there one of the judges as aforesaid, of the election aforesaid, then and there well knowing the premises, and then and there well knowing that the said A B was then and there a person not having all the qualifications of an elector prescribed by the aforesaid act of the said general assembly, did then and there unlawfully, fraudulently, and knowingly sanction said reception of the aforesaid vote of and from him, the said A B, by the said E F, in manner and form aforesaid.

Fraudulent reception of a vote from one who refuses to be sworn.

That on the ——— day of ———, in the year of our Lord one thousand nine hundred and ———, at the township of ———, in the county of ——— aforesaid, a certain election was duly holden (set out what election was held), the same being authorized by the laws of the State of Ohio, at which said election E F, C D,

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and S T then and there acted as judges, and that one A B did then and there personally appear at the polls of said election, before the said judges thereof, and then and there offered to vote at said election, whereupon the said A B was then and there challenged as unqualified then and there to vote, by a certain elector, to-wit, by one A Y, then and there being, and, thereupon, the said A B was then and there requested and required, as well by the said A Y, an elector as aforesaid, as also by the aforesaid judges of said election, then and there to be sworn or affirmed in due form of law, and then and there to answer all such questions as should be put to him then and there touching his place of residence and qualifications as an elector at said election; and the said E F, one of the aforesaid judges of said election, did then and there tender to him, the said A B, the oath or affirmation in such cases required by law; and he, the said A B, being then and there challenged as aforesaid, and required to be sworn as aforesaid, fully and truly to answer all the questions aforesaid, then and there did refuse as well to be sworn or affirmed, in manner aforesaid, and to take the oath prescribed by the act of the general assembly of the said State of Ohio, in reference to the manner of holding elections, as also to answer any of the questions which were then and there put to him, the said A B, in accordance with the provisions of the aforesaid act, or to answer any questions whatsoever, under oath, touching his right to vote at said election; and that the said E F, judge as aforesaid of said election, then and there, notwithstanding the premises aforesaid, after the refusal aforesaid, did unlawfully, fraudulently, and knowingly, receive a ballot from him, the said A B, as and for a good and legal vote and ballot; and the jurors aforesaid, upon their oaths and affirmations aforesaid, further say that the said C D, judge as aforesaid, then and there, well knowing the premises, and then and there well knowing that the said A B had then and there refused as aforesaid, as well to take the oath or affirmation aforesaid, as also to answer any of the questions then and there put to him as aforesaid, then and there unlawfully, wilfully, and knowingly did sanction the aforesaid reception of the ballot aforesaid from the said A B by the said E F in the manner and form aforesaid.

Sec. 13292. Judge neglecting to forward notice.

Whoever, being one of the judges of election making an appointment of registrar, judge or clerk of election to fill a vacancy caused by absence or removal, neglects or fails to send notice thereof to the board of deputy state supervisors, or, whoever, being a person to whom such notice for such board may be given for delivery thereto, neglects or fails to deliver it promptly, shall be fined not less than twenty-five dollars nor more than one hundred dollars or imprisoned thirty days, or both. (R. S. § 2926w; 83 v. 226; 97 v. 214; 98 v. 223.)

Sec. 13293. Judge or clerk distributing ballots inside polling room.

Whoever, being a judge or clerk of election, witness, challenger or other person admitted into the polling room at an election, and while therein, from the opening of the polls until the ballots are finally counted and certified, distributes or gives to a person, brings therein

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or has in his possession or control, a ballot or ticket except that which he offers to the judges as his own vote if an elector, shall be fined not less than twenty-five dollars nor more than five hundred dollars or imprisoned in jail not less than thirty days nor more than one year. (R. S. § 2926w; 83 v. 226; 97 v. 214; 98 v. 223.)

Sec. 13294. Judge or clerk misleading voter.

Whoever, being a judge or clerk of election, misleads an illiterate or blind elector, or an elector who is unable to prepare his ballot, or prepares a ballot for such elector otherwise than as directed by him, shall be fined not less than one hundred dollars nor more than one thousand dollars and imprisoned in jail not less than three months nor more than twelve months. (89 v. 450, § 29; 88 v. 460, § 22; R. S. § 2966-44.)

Sec. 13295. Judge or clerk disclosing how elector voted.

Whoever, being a judge or clerk of election, discloses to any person except when legally required so to do, how a voter whose ballot he prepared directed such ballot to be prepared, or how such voter voted, shall be fined not less than one hundred dollars nor more than one thousand dollars and imprisoned in jail not less than three months nor more than twelve months. (89 v. 450, § 29; 88 v. 460, § 22; R. S. § 2966-44.)

Sec. 13296. Judge or clerk neglecting official duty.

Whoever, being a judge or clerk of an election, on whom a duty is enjoined by law, wilfully neglects or corruptly executes such duty, if there is no penalty otherwise specifically provided, shall be fined not less than three hundred dollars nor more than one thousand dollars and imprisoned not less than three months nor more than six months. (R. S. § 7058; 73 v. 157; 77 v. 267; S. & C. 547.)

REGISTRATION.

Sec. 13297. Fraudulent registration.

Whoever fraudulently obtains or attempts to obtain registration as an elector in a precinct in which he is not a qualified elector shall be imprisoned in the penitentiary not less than one year nor more than three years. (R. S. § 2926w; 83 v. 226; 97 v. 214; 98 v. 223.)

An indictment under this section which alleges that the defendant represented to the registrar that he was a qualified elector of precinct "A," of the third ward of the city of Findlay, Ohio, and that he did then and thereby falsely, fraudulently and unlawfully obtain registration as an elector in said precinct, is bad on demurrer, since it does not state the facts upon which said false registration was obtained. Ebbenpowell v. State, 14 C. C. 129, 7 O. C. D. 573.

A dismissal upon charge of illegal voting under G. C. § 13254 for one who has temporarily come into a precinct is not a bar against a prosecution under this section for falsely and fraudulently obtaining registration at the same election. In re Donahue, 4 N. P. 296, 6 O. D. 389.

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Sec. 13298. Inducing same.

Whoever knowingly induces or attempts to induce, aids or abets a person to obtain or apply for registration as an elector in a precinct where such person is not a qualified elector, shall be imprisoned in the penitentiary not less than one year nor more than three years. (R. S. § 2926w; 83 v. 226; 97 v. 214; 98 v. 223.)

Sec. 13299. Obtaining registration by personating another.

Whoever falsely personates or assumes the name of another, real or fictitious, living or dead, in obtaining or attempting to obtain registration in such assumed name as an elector, or falsely obtains or applies for registration as an elector in a name other than his own, or fraudulently aids or abets another committing or attempting to commit either of such offenses, shall be imprisoned in the penitentiary not less than two years nor more than five years. (R. S. § 2926w; 83 v. 226; 97 v. 214; 98 v. 223.)

Sec. 13300. Hindering registration.

Whoever fraudulently or unlawfully prevents, hinders or delays an elector from applying for registration as an elector in the precinct where such elector resides and is entitled to vote, or attempts so to do, with intent to deprive such elector of his right to vote, shall be fined not less than fifty dollars nor more than five hundred dollars, and imprisoned in jail not less than thirty days nor more than six months. (R. S. § 2926w; 83 v. 226; 97 v. 214; 98 v. 223.)

Sec. 13301. Procuring unlawful erasure in registration lists.

Whoever, by false statement or other unlawful means, procures, aids, or attempts to procure, the erasure or striking out on the register or duplicate list in a precinct of the name of a qualified elector therein, shall be imprisoned in the penitentiary not less than one year nor more than three years. (R. S. § 2926w; 83 v. 226; 97 v. 214; 98 v. 223.)

Sec. 13302. Officer permitting false registration.

Whoever, being a registrar of electors, or other registering officer, enters or consents to the entry in a register or duplicate list of electors in a precinct, the name of a person whom he knows or has good reason to believe is not a qualified voter therein, shall be imprisoned in the penitentiary not less than one year nor more than five years. (R. S. § 2926w; 83 v. 226; 97 v. 214; 98 v. 223.)

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Sec. 13303. Inducing false registration.

Whoever, by gift, promise, offer, coercion, intimidation or other unlawful means, induces or influences, or attempts to induce or influence a registrar of electors or other registering officer, to enter in the register or duplicate list of electors in a precinct, the name of a person, real or fictitious, living or dead, who is not a qualified elector therein, shall be imprisoned in the penitentiary not less than one year nor more than three years. (R. S. § 2926w; 83 v. 226; 97 v. 214; 98 v. 223.)

Sec. 13304. Officer refusing registration.

Whoever, being a registrar of election, or other registering officer, upon request, refuses, neglects or hinders the registration of a qualified voter who offers to comply with the laws relating to registering, shall be imprisoned in the penitentiary not less than one year nor more than five years. (R. S. § 2926w; 83 v. 226; 97 v. 214; 98 v. 223.)

Sec. 13305. Inducing same.

Whoever fraudulently induces a registrar or registering officer, to refuse registration in a precinct to an elector thereof, shall be imprisoned in the penitentiary not less than one year nor more than three years. (R. S. § 2926w; 83 v. 226; 97 v. 214; 98 v. 223.)

Sec. 13306. Inducing registrar to violate law.

Whoever, unlawfully prevents, hinders or delays a registrar or registering officer from registering a person lawfully entitled to be registered, or influences or induces such registrar or registering officer to violate, refuse or neglect the execution of a lawful rule or duty of his office, shall be imprisoned in the penitentiary not less than one year nor more than three years. (R. S. § 2926w; 83 v. 226; 97 v. 214; 98 v. 223.)

Sec. 13307. Acting as registrar, judge or clerk without certificate of appointment.

Whoever acts as a registrar, judge or clerk of election without having received a certificate of appointment from the board of deputy state supervisors, except a judge and clerk appointed to fill a vacancy caused by absence or removal, or whoever being so appointed, acts without notice thereof having been sent to such board, shall be fined not less than twenty-five dollars nor more than one hundred dollars or imprisoned thirty days, or both. (R. S. § 2926w; 83 v. 226; 97 v. 214; 98 v. 223.)

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Sec. 13308. Failure of registrar, judge, etc., to appear before election board.

Whoever, being an elector in a city in which registration of electors is required by law, having been selected by the board of deputy state supervisors as a registrar of electors, judge of election, additional judge of election, or clerk of election in such city, fails to appear for examination as to his qualifications therefor, before such board at its office within twenty-four hours, after notice served personally upon him, or left at his usual place of residence, or having been appointed to one of the offices afore mentioned, refuses or neglects to take and subscribe the required oath of office, unless excused by such board, shall be fined not less than twenty-five dollars nor more than one hundred dollars or imprisoned in the county jail not more than fifteen days, or both. (R. S. § 2926e; 82 v. 232; 83 v. 209; 89 v. 157; 97 v. 195.)

Sec. 13309. Neglect of duty by registrar.

Whoever, being lawfully appointed registrar of election, fails to be at the place designated for registration in the precinct in which he resides during the hours set for the registration of electors, or fails to deposit the registers of electors at the office of the board of deputy state supervisors in accordance with law, or fails to post the printed list required by law, shall be fined not less than twenty-five dollars nor more than one hundred dollars or imprisoned in the county jail not more than fifteen days, or both. (R. S. § 2926e; 82 v. 232; 83 v. 209; 89 v. 157; 97 v. 195.)

Sec. 13310. Counterfeiting registration certificates.

Whoever makes, issues, utters or publishes a false or counterfeit certificate of registration authorized by law to be granted by registrars of electors and boards of deputy state supervisors, or fraudulently alters such certificate granted by such officers, shall be imprisoned in the penitentiary not less than two years nor more than five years. (R. S. § 2926w; 83 v. 226; 97 v. 214; 98 v. 223.)

Sec. 13311. Perjury before registrar.

Whoever wilfully and corruptly swears or affirms falsely upon a lawful examination by or before a registrar or registering officer as provided by law, shall be imprisoned in the penitentary not less than one year nor more than five years. (R. S. § 2926w; 83 v. 226; 97 v. 214; 98 v. 223.)

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BRIBERY AND CORRUPTION.

Sec. 13312. Giving bribe.

Whoever gives or lends, or offers or promises to give, lend, procure or endeavor to procure money or other valuable consideration, to or for an elector or other person, to induce such elector to register or refrain from registering for an election, or vote or refrain from voting at an election, or vote or refrain from voting at an election for a particular person, question or proposition, or on account of such elector having registered or refrained from registering, or voted or refrained from voting, or voted or refrained from voting for a particular person, question or proposition, shall be fined not more than five hundred dollars or imprisoned in the penitentiary not more than three years, or both, and shall forfeit the office to which he was elected at the election with reference to which such offense was committed. (89 v. 451, § 32; 98 v. 227, § 35; R. S. 2966-48-51.)

FORM OF CHARGE.

Bribing an elector.

At the November election, 19—, duly holden in the county aforesaid and authorized by the laws of Ohio, and A B and C D were respectively candidates for the office of ———; and that prior to the holding of the said election, on the ——— day of ———, 19—, the said E F being then and there an elector and having the right to vote at said election, did then and there unlawfully, knowingly and wilfully offer to one M N a sum of money, to-wit, the sum of ——— dollars, to induce the said M N, then and there being a lawful elector and entitled to vote at said election, to vote for the said A B and against the said C D, and the said E F did then and there knowingly, unlawfully and by bribery attempt to, and did influence the said M N as such elector at said election to cast his vote for the said A B as aforesaid.

Sec. 13313. Same.

Whoever gives, offers or procures, or promises or endeavors to procure an office, place or employment to or for an elector or other person, in order to induce such elector to register or refrain from registering for an election, or vote or refrain from voting at an election, or vote or refrain from voting at an election for a particular person, question or proposition, or advances, pays or causes to be paid, money or other valuable thing to or for the use of another, with the intent that it or part thereof shall be used in bribery at an election, shall be fined not more than five hundred dollars or imprisoned in the penitentiary not more than three years, or both, and shall forfeit the office to which he was elected at the election with reference to which such offense was committed. (89 v. 451, § 32; 98 v. 227, § 35; R. S. 2966-48-51.)

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Sec. 13314. Receiving bribe.

Whoever, being an elector, before, during or after an election, receives, agrees or contracts for money, gift, loan or other valuable consideration, office, place or employment, for himself or another for registering or agreeing to register, or refraining or agreeing to refrain from registering for an electon, or for voting or agreeing to vote, or refraining or agreeing to refrain from voting at an election, or for voting or agreeing to vote, or refraining or agreeing to refrain from voting for a particular person, question or proposition at an election, shall be fined not more than five hundred dollars or imprisoned not more than one year, or both, and be excluded from the right of suffrage for five years next succeeding such conviction. (89 v. 451, § 33; 98 v. 227, § 35; R. S. 2966-51.)

Section 13314, General Code, providing for the exclusion from the right of suffrage of one who sells his vote, is within the express authority conferred upon the General Assembly by § 4 of Article V of the Constitution, to exclude "Any person convicted of bribery, perjury or other infamous crime." Grooms v. State, 83 O. S. 408.

Sec. 13315. Offender compelled to testify.

A person violating a provision of the next three preceding sections is a competent witness against another so offending, and may be compelled to testify upon a trial, hearing or investigation, but the testimony so given shall not be used in a prosecution or proceeding, civil or criminal, against the person so testifying, and he shall not be liable thereafter to indictment, prosecution or punishment for the offense with reference to which his testimony was given and the giving of such testimony shall bar such indictment or prosecution. (98 v. 227, § 35; 88 v. 467, § 27; 89 v. 452, § 35; 98 v. 167; R. S. 2966-51.)

The provisions of this section protecting a witness from testifying against himself are similar in character to those of an act of congress sustained as constitutional in Brown v. Walker, 161 U. S. 591.

Sec. 13316. Bribery by candidate at nominating convention.

Whoever, being a candidate for nomination to an office in a convention held as provided by law, pays or promises to pay money or property to a delegate for obtaining his influence or vote for such nomination, shall be fined not less than one hundred dollars nor more than five hundred dollars, and, if nominated and elected to such office, shall forfeit it and be disqualified from voting or being nominated at such election or convention. (R. S. § 7042; 71 v. 114, § 9.)

Sec. 13317. Receiving bribe at primary election.

Whoever solicits, requests, demands or receives money, intoxicating liquor or other thing of value, or the promise thereof, to influence his vote, or to be used, or under the pretense of being used to procure the vote of another or to be used at a poll or other place prior to or on the day of a primary election for or against a candidate to be voted upon at

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such election, shall be fined not less than one hundred dollars nor more than five hundred dollars or imprisoned in the penitentiary for one year, or both. (97 v. 107, § 2; 99 v. 224, § 42; R. S. 2919-2.)

Sec. 13318. Giving bribe at same.

Whoever gives money, property, fee or reward for the vote or influence of a person in favor of or against a candidate for nomination at an election held under the law relating to primary elections, shall be fined not less than one hundred dollars and imprisoned in the penitentiary not more than two years. (R. S. § 7039; 86 v. 363; 82 v. 224; 68 v. 29, § 6.)

Sec. 13319. Bribery at nomination.

Whoever gives a reward, fee, money or property to influence the vote of a delegate or an elector in favor of or against a candidate, or for labor or service rendered or to be rendered to a candidate for nominaton or election to an office, or for expense incurred in his behalf, shall be fined not more than five hundred dollars and imprisoned in the penitentiary not more than five years. (R. S. § 7041; 86 v. 364; 82 v. 224; 71 v. 114, § 8.)

Sec. 13320. Money for political purposes by corporations.

Whoever, being a corporation engaged in business in this state, directly or indirectly, pays, uses, offers, or consents or agrees to pay or use money or property for, or in aid of a political party, committee or organization, or for or in aid of a candidate for political office, or for a nomination thereto, or uses money or property for any political purpose whatever, or for the re-imbursement or indemnification of any person or persons for money or property so used, shall be fined not less than five hundred dollars nor more than five thousand dollars. (99 v. 23, 24, §§ 1, 3.)

Sec. 13321. Aid or advice of such case.

Whoever, being an officer, stockholder, attorney or agent of a corporation violating the next preceding section, participates in, aids or advises such violation or solcits or knowingly receives money or property in violation of such section, shall be fined not more than one thousand dollars or imprisoned not more than one year, or both. (99 v. 24, § 3.)

Sec. 13322. Annual report of corporation thereon.

Whoever, being a corporation for profit, violates any provision of the law requiring it to make out, have sworn to by an officer thereof who has knowledge of the facts, and file with the secretary of state, auditor of state or state superintendent of insurance, an affidavit respecting the use of its funds or property for political purposes, or its consent thereto, shall be fined not less than fifty dollars nor more than five hundred dollars. (99 v. 24, § 3.)

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Sec. 13323. Witnesses under next three preceding sections.

A person violating any of the next three preceding sections is a competent witness against another person so offending and may be compelled to attend and testify on a trial, hearing, proceeding or investigation thereof. The testimony so given shall not be used in a prosecution or proceeding, civil or criminal, against the person so testifying nor shall such person thereafter be liable to indictment, prosecution or punishment for the offense with reference to which his testimony was so given, and he may plead or prove the giving of such testimony in bar of such indictment or prosecution. (99 v. 24, § 3.)

Sec. 13323-1. Penalty.

Any person convicted of a corrupt practice under this act shall be fined not less than one hundred dollars and not more than five hundred dollars, or imprisoned in the county jail not to exceed six months, or both; and if he shall have been elected to office, he shall in addition thereto forfeit such office. (102 v. 330.)

Sec. 13323-2. Incrimination no excuse from testifying.

No person shall be excused from attending and testifying, or from producing any books, papers or other documents before any court or judge upon any trial, investigation, or hearing under the provisions of this act, upon the ground, or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to convict him of a crime, or subject him to a penalty or forfeiture; but no person shall be prosecuted or subjected to any penalty or forfeiture, for or on account of any transaction, matter or thing concerning which he may so testify, or produce evidence, documentary or otherwise, and no testimony so given or produced shall be received against him upon any criminal investigation or proceeding. (102 v. 330.)

Sec. 13323-3.

All prosecutions under this act must be commenced within one year after the commission of the act complained of. (102 v. 330.)

PRIMARY ELECTION.

Sec. 13324. Penalties applying to primary elections.

All provisions and requirements of law to preserve and protect the purity of elections, and all penalties for the violation of such laws shall apply and be enforced as to all primary elections. (99 v. 224, § 43; R. S. § 7045; 51 v. 421, § 1; 98 v. 226; S. & C. 543.)

Sec. 13325. Voting, not a qualified elector.

Whoever votes at a primary election when he can not become a qualified elector in such precinct at or before the next election, shall be fined not less than fifty dollars nor more than two hundred dollars or imprisoned not less than ten days nor more than sixty days, or both. (R. S. § 7043; 68 v. 29, §§ 4, 5.)

The primary election law, enacted in April, 1904 (97 O. L. 439, 97 O. L. 107, repealed, 99 O. L. 224), providing for primary election by political parties that cast at least ten per cent. of the vote cast at the last general election, was held constitutional in State v. Felton, 77 O. S. 554.

A prosecution for illegal voting at a primary election must be brought under the provisions of this section and not under provisions of § 13250, et seq. State v. Volkopf, 8 O. D. 687.

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Sec. 13326. Voting after objection made.

Whoever casts a ballot at a primary election after objection has been made and sustained to his vote, shall be fined not less than fifty dollars nor more than two hundred dollars or imprisoned not less than ten days nor more than sixty days, or both. (R. S. § 7043; 68 v. 29, §§ 4, 5.)

Sec. 13327. Voting, after a change in party.

Whoever votes at a primary election, not having voted at the last general election, held in an even-numbered year, with the political party with which he desires, or offers, to vote at such primary election, unless he is a first voter, or did not vote at such general election, shall be fined not less than one hundred dollars nor more than three hundred dollars or imprisoned in the penitentiary for one year, or both. (97 v. 107, § 1; R. S. 2919-1.)

Sec. 13328. Voting at certain poll place.

Whoever votes at a primary election at a place other than at the polling place in the precinct wherein he resides, shall be fined not less than one hundred dollars nor more than three hundred dollars or imprisoned in the penitentary for one year, or both. (97 v. 107, § 1; R. S. 2919-1,)

Sec. 13329. Voting, when not a citizen.

Whoever, not being a citizen of the United States, votes at a primary election shall be fined not less than fifty dollars nor more than two hundred dollars or imprisoned in jail not less than ten days nor more than sixty days, or both. (R. S. § 7043; 68 v. 29, §§ 4, 5.)

Upon an indictment for voting at an election, without being a citizen of the United States it is sufficient to prove that the defendant is a foreigner by birth and that he deposited a ballot, without showing that he voted for any person. State v. McGinly, 2 Dec. Rep. 398.

Sec. 13330. Voting more than once.

Whoever votes more than once at the same primary election, shall be imprisoned in the penitentiary not less than one year nor more than five years. (99 v. 223, § 38; 97 v. 107, § 1.)

Sec. 13331. Voting, not a resident.

Whoever votes at a primary election not being an elector resident of the precinct, ward or township in which he votes, shall be fined not less than one hundred dollars nor more than three hundred dollars or imprisoned in the penitentiary for one year, or both. (97 v. 107, § 1; R. S. § 2919-1.)

Sec. 13332. Voting under false name, etc.

Whoever votes or attempts to vote, or tenders to the judge of elections for deposit in the ballot box, a ticket at a primary election knowing that he is not a qualified elector, or votes under an assumed or false name, shall be imprisoned in the penitentiary not less than one year nor more than three years. (99 v. 223, § 36.)

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Sec. 13333. Impersonating another.

Whoever personates another for the purpose of voting, or attempts to vote at a primary election by claiming or assuming the name or place of an elector, shall be imprisoned in the penitentiary not less than one year nor more than five years. (99 v. 223, § 36.)

Sec. 13334. Falsely signing certain papers.

Whoever, with intent to defraud or deceive, writes or signs the name of another person to any document, nomination paper or book, authorized or required by the laws relating to primary elections, shall be guilty of forgery and be imprisoned in the penitentiary not less than one year nor more than three years. (99 v. 223, § 36.)

Sec. 13335. Voting with wrong political party.

Whoever votes or attempts to vote at the primary election of a political party other than the political party with which he has affiliated as defined by law, shall be fined not less than fifty dollars nor more than five hundred dollars or imprisoned in jail not less than three months nor more than six months, or both. (99 v. 223, § 37.)

Sec. 13336. Intimidating elector.

Whoever attempts to intimidate an elector or a supervisor or judge of an election held under the laws relating to primary elections or interferes with or disturbs such election, shall be fined not more than one hundred dollars and imprisoned not less than twenty days nor more than thirty days. (R. S. § 7040; 68 v. 29, § 6.)

Sec. 13337. Omission of duty by supervisor, or judge.

Whoever, being a supervisor or judge of a primary election, wilfully omits a duty imposed upon him by law, shall be fined not less than fifty dollars nor more than two hundred dollars or imprisoned in jail not less than ten days nor more than sixty days, or both. (R. S. § 7043; 68 v. 29, §§ 4, 5.)

Sec. 13338. Official refusing to perform duty.

Whoever wilfully refuses or neglects to perform a duty prescribed by the laws regulating the conduct of primary elections, for which no other penalty is provided by law, shall be fined not less than five dollars nor more than fifty dollars or imprisoned in the county jail not less than five days nor more than thirty days, or both. (99 v. 223, § 39.)

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Sec. 13339. Refusing to testify.

Whoever, having been duly subpoenaed or ordered to appear before a grand jury, court, board or officer in a proceeding or prosecution upon complaint, information, affidavit or indictment, for an offense under the laws relating to primary elections, fails so to do, or having appeared, refuses to answer a question pertinent to the matter under inquiry or investigation, or refuses to produce, upon reasonable notice, any material, books, papers, documents or records in his possession or under his control, shall be fined not less than one hundred dollars nor more than five thousand dollars and imprisoned in jail not less than thirty days nor more than six months. (99 v. 224, § 44.)

Sec. 13340. Witness testifying exempt.

In a proceeding or prosecution brought under the laws relating to primary elections, if a person is called to testify, he shall be required to testify to all facts of which he has knowledge, and the fact that he has so testified shall forever be a bar to a prosecution brought against him for violating such laws as to such matters to which he may have testified. (99 v. 224, § 44; 97 v. 107, § 3; R. S. § 2919-3.)

MISCELLANEOUS.

Sec. 13341. Deceiving elector who cannot read.

Whoever furnishes a ballot to an elector who can not read, informing him that it contains a name different from those which are written or printed thereon, with intent to induce him to vote contrary to his inclination, shall be imprisoned in the penitentiary not less than one year nor more than three years. (R. S. § 7054; 39 v. 13, § 12; S. & C. 545.)

Sec. 13342. Attempting to speak to a person within the guard rail.

Whoever, at an election, speaks or attempts to speak to a person while within the guard rail, except as provided by law, shall be fined not less than twenty-five dollars nor more than five hundred dollars or imprisoned in jail not more than six months, or both. (89 v. 450, § 30; 88 v. 464, § 21; R. S. § 2966-45.)

Sec. 13343. Hindering another from voting.

Whoever wilfully hinders or delays an elector from voting at an election, shall be fined not less than one hundred dollars nor more than one thousand dollars or imprisoned in jail not more than one year, or both. (89 v. 449, § 28; 88 v. 464, § 21; R. S. § 2966-43.)

Sec. 13343-1. Printing or posting anonymous attacks on candidates.

Whoever writes, prints, posts or distributes, or causes to be written, printed, posted or distributed, a circular or advertisement which is designed to promote the election of a candidate, or to injure or defeat any candidate for election at any primary or any general election, or to influence the voters in any primary or any general election, or to influence the voters on any constitutional amendment, unless there appears on such circular or poster, or advertisement, in a conspicuous place, either the names of the chairman or secretary, or of two officers of the organization issuing the same, or of some voter who is responsible therefor, with his name and address, shall be guilty of a misdemeanor and shall be fined not less than one hundred dollars, nor more

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than one thousand dollars, or imprisoned not more than one year, or both. (106 v. 350.)

Sec. 13344. Loitering, etc., near polls.

Whoever, within the boundaries of a municipality and within one hundred feet of the polling place of an election, loiters upon the streets, alleys or sidewalks during the receiving and counting of the ballots or hinders or delays an elector in reaching or leaving the place fixed for the casting of such ballots shall be fined not less than five dollars nor more than one thousand dollars or imprisoned in jail not less than five days nor more than thirty days, or both. The judges of election may order the arrest of a person violating this section, but such arrest shall not prevent such person from voting if entitled so to do. (R. S. § 2938; 39 v. 13, § 22; 74 v. 215, § 15; 86 v. 368; 97 v. 217.)

Sec. 13345. Removing or destroying election supplies.

Whoever, during an election, wilfully removes or destroys any of the supplies or conveniences furnished to enable a voter to prepare his ballot, shall be fined not less than one hundred dollars nor more than one thousand dollars or imprisoned in jail not more than one year, or both. (89 v. 449, § 28; 88 v. 464, § 21; R. S. 2966-43.)

Sec. 13346. Destroying certificate of election result.

Whoever wilfully destroys, defaces or conceals a lawful certificate or statement of the result of an election entrusted to him or his care for delivery, shall be imprisoned in the penitentiary not less than two years nor more than five years. (R. S. § 2926w; 83 v. 226; 97 v. 214; 98 v. 223.)

Sec. 13347. Publishing false statement of election results.

Whoever makes, issues, utters or publishes a false certificate, statement or proclamation of the result of an election, knowing it to be false, shall be imprisoned in the penitentiary not less than two years nor more than five years. (R. S. § 2926w; 83 v. 226; 97 v. 214; 98 v. 223.)

Sec. 13348. Damage to or destruction of registers.

Whoever wilfully mars, damages or destroys a register of electors, or a portion thereof, shall be fined not less than twenty-five dollars nor more than one hundred dollars or imprisoned in the county jail not more than fifteen days, or both. (R. S. § 2926e; 82 v. 234; 83 v. 212; 89 v. 157; 97 v. 195.)

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Sec. 13349. Destroying certificate of nomination, etc.

Whoever falsely makes or wilfully defaces or destroys a certificate of nomination, nomination paper or part thereof or a letter of withdrawal, or signs such certificate or paper contrary to law, or files a certificate of nomination, nomination paper or letter of withdrawal, knowing it or part thereof to be falsely made, or suppresses a certificate of nomination or nomination paper, or part thereof, which has been duly filed, shall be fined not less than one hundred dollars nor more than one thousand dollars or imprisoned in jail not more than one year, or both. (89 v. 449, § 28; 88 v. 464, § 21; R. S. 2966-43.)

Sec. 13350. Fraudulent writing on poll books or tally sheets.

Whoever, from the time ballots are cast or voted until the time has expired for using them as evidence in a contest of election, wilfully and with fraudulent intent, inscribes, writes or causes to be inscribed or written in or upon a poll-book, tally-sheet or list, lawfully made or kept at an election, or in or upon a book or paper purporting to be such, or upon an election return, or upon a book or paper containing such return, the name of a person not entitled to vote at such election or not voting thereat, or a fictitious name, or, within such time, wrongfully changes, alters, erases or tampers with a name, word or figure contained in such poll-book, tally-sheet, list-book or paper, or falsifies, marks or writes thereon with intent to defeat, hinder or prevent a fair expression of the will of the people at such election, shall be imprisoned in the penitentiary not less than one year nor more than three years. (R. S. § 7061; 78 v. 30; 67 v. 51, § 1.)

In an indictment under this section it is not necessary to set out a copy of the poll-book or tally-sheet on which the offense was committed, nor is the purport thereof required; it is sufficient to describe it by the designation "poll-book" or "tally-sheet," and to aver that the defendant wrongfully and fraudulently changed, altered, erased, or tampered with a "name," "word," or "figure," contained in such poll-book or tally-sheet, as the facts may require, setting forth the nature and the character of the alteration made; and that it was done with intent to defeat, hinder, or prevent a fair expression of will of the people at an election. State v. Granville, 45 O. S. 264.

The proof offered, that a certain mark opposite certain names on the certified list of voters at a primary election was made by the defendant, in this case, was sufficient to establish that fact beyond a reasonable doubt; and the use of these marks as a standard, from comparison with which an expert testified that other marks made opposite other names were made by the same hand, was a legal method of proof and established the fact claimed beyond a reasonable doubt. Ryan v. State, 10 C. C. N. S. 497; 20 O. C. D. 306.

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FORM OF CHARGE.

Changing, altering, erasing and tampering with the tallies and figures contained in a poll-book.

On the ——— day of ———, A. D. 19—, in precinct ———, of the ——— ward, of the city of ———, in the county of ———, State of Ohio, an election was duly holden, the same being authorized by the laws of the State of Ohio, at which election in said precinct C D, G H, and H I acted as judges of said election, and O P and Q R as clerks of said election; that then and there, at said election (mention the offices and the names of the candidates); that each of said candidates received votes at said election for the offices for which they were respectively candidates, and said election was duly holden under the laws of the State of Ohio, to elect officers for the various offices above named, and for which the above named candidates were respectively candidates; that then and there, after the closing of the polls at said election, the ballots cast thereat were duly counted and entered by tallies, upon tally-sheets provided according to law, and the number of ballots cast for each candidate was then and there enumerated and set down in figures, as is provided by law, on the tally-sheets aforesaid; that within three days thereafter one of the poll-books of said election, and one of the tally-sheets aforesaid made up by said judges and clerks at said election, as provided by law as aforesaid, was deposited as required by law with the clerk of the court of common pleas of said county, at his office in said county and state; that afterward, to-wit, on the ——— day of ———, A. D. 19—, in said county and state, E F did then and there, and before the time, as fixed by the law of said state, had expired for using said poll-book and tally-sheet in any contest of said election, wrongfully, unlawfully, and feloniously change, alter, erase, and tamper with the tallies and figures contained in said poll-book and tally-sheet of said election so held, canvassed, and returned as aforesaid in precinct ———, ——— ward, city of ———, aforesaid, as follows, to-wit: the number of tallies so entered and ballots cast for ——— for ———, to-wit, ———, were so changed and altered, erased, and tampered with as to read ———, and so as to each of the candidates named. All with intent thereby then and there to defeat, hinder, and prevent a fair expression of the people at said election so held as aforesaid in precinct ———, of ——— ward, city of ———, county of ———, State of Ohio, on the said ——— day of ———, A. D. 19—.

Sec. 13350-1. Absent voter's ballot; penalty for offenses relating thereto.

Whoever impersonates another or makes a false representation in order to obtain an absent voter's ballot, or knowingly connives to help a person to vote an absent voter's ballot illegally, or being a member or officer or employe of any board of deputy state supervisors of elections opens, destroys, steals, marks or mutilates any absent voter's ballot or aids or abets another to do so after the same has been voted, or delays in delivering such ballots to the proper officers of elections with a view to prevent said ballots arriving in time to be counted or in any manner aids or attempts to aid any person to vote an absent voter's ballot unlawfully, or hinders or attempts to hinder a duly qualified elector from voting an absent voter's ballot, or hinders or attempts to hinder any official from delivering or counting any absent voter's ballot, shall be guilty of a felony and shall be imprisoned in the penitentiary for not less than one nor more than five years. (107 v. 58.)

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Sec. 13351. Destroying ballot box, ballots or poll-books.

Whoever, from the time ballots are cast or voted until the time has expired for using them as evidence in a contest of election, unlawfully destroys or attempts to destroy a ballot box or poll-book used at an election, or destroys, falsifies, marks or writes on a ballot cast or voted or changes, alters, erases or tampers, with a name on a ballot cast or voted, shall be imprisoned in the penitentiary not less than one year nor more than five years. (R. S. § 7060; 78 v. 30; 53 v. 59, §§ 2, 3; S. & C. 548.)

FORMS OF CHARGES.

Destroying a ballot-box.

That, on the ——— day of ———, in the year of our Lord one thousand nine hundred and ———, in the township of ———, in the county of ——— aforesaid, in the said State of Ohio, an election was being duly held (set out what election was held), said election being authorized to be held by and in pursuance of the laws of the said State of Ohio, at which said election O P, Q R, and S T, then and there acted as judges thereof, and E P and F S acted as clerks of said election; they, the said judges, and clerks, then and there being duly qualified and lawfully authorized to act as such judges and clerks; and that E F, C D, and G H, all late of the county aforesaid, then and there, in and upon the aforesaid judges and clerks of said election then and there being and acting as such judges and clerks, then and there unlawfully and violently did make an assault,* and then and there unlawfully and violently did strike, break, split, and destroy the ballot-box of said election before the time, as fixed by the law of said state, had expired for using said ballot-box in any contest of said election, which said ballot-box was then and there used as such at the election aforesaid, and then and there contained a large number, to-wit, one hundred lawful votes and ballots, which had then and there been duly cast and deposited in the same at said election.

Destroying ballots.

(Follow the last form to the *, and then proceed thus:)—and then and there, divers, to-wit, five hundred votes and ballots, unlawfully and by violence out of the ballot-box of said election did take, tear in pieces, burn and destroy before the time, as fixed by the law of said state, had expired for using said ballots in any contest of said election, which said votes and ballots had been then and there duly and legally deposited in the ballot-box aforesaid of such election, which said ballots were then and there the lawful votes of the citizens of the said township.

Destroying poll-book.

(Follow the first form to the *, and then proceed thus:)—and then and there unlawfully and violently, one certain poll-book (or, two poll-books, as the case may be) then and there being kept and used as such poll-book at and of the election aforesaid, unlawfully and violently out of the possession of the said F S, clerk as aforesaid, did take, and the same poll-book, they, the said E F, C D, and G H, then and there unlawfully, by force and violence, did tear in pieces, burn, and destroy before the time, as fixed by the law of said state, had expired for using said poll-book in any contest of said election.

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Sec. 13352. Unlawfully obtaining or attempting to obtain ballot box or ballots.

Whoever, at an election, unlawfully, either by force, fraud or other improper means, obtains or attempts to obtain possession of a ballot box or ballots therein deposited, while the voting at such election is going on or before the ballots therein are lawfully taken out and enumerated by the judges of election, shall be imprisoned in the penitentiary not less than one year nor more than three years. (R. S. § 7059; 53 v. 59, §§ 1, 3; S. & C. 548.)

FORMS OF CHARGES.

Taking possession of a ballot-box by force.

That, on the ——— day of ———, in the year of our Lord one thousand nine hundred and ———, in the eighth ward of the city of ———, in the county of ——— aforesaid, a certain election was held (set out what election was held), said election being authorized to be held by virtue of the laws of the said State of Ohio, at which said election O P, Q R, and S T, acted as judges, and E P and F S, then and there, acted as clerks, of said election, and that E F and C D, then and there, while the voting at said election was going on, and before the ballots had then and there been duly taken out of the ballot-box of said election by the aforesaid judges of said election, according to law,* in and upon the judges aforesaid, of the election aforesaid, unlawfully, violently, and in a menacing manner, did make an assault, and then and there the ballot-box aforesaid, from the judges of the election aforesaid, unlawfully and by force and violence did take and obtain the possession of, and the same ballot-box then and there did have and keep.

Attempting to get possession of the ballot-box.

(Follow first form to the *, and then proceed thus:)—in and upon the judges and clerks aforesaid, of the election aforesaid, unlawfully, violently, and in a menacing manner, did make an assault, and then and there unlawfully did threaten said judges and clerks, and then and there, by the aforesaid assault and threatening, and the improper means aforesaid, did unlawfully, by force and violence, attempt to obtain possession of the ballot-box, then and there being used as such, at said election, in which said ballot-box were deposited a large number, to-wit, five hundred lawful votes and ballots.

Attempting to get possession of ballots.

(Follow first form to the *, and then proceed thus:)—in and upon the judges and clerks aforesaid, then and there being and acting as such judges and clerks, unlawfully, violently and in a menacing manner did make an assault, and then and there unlawfully and violently did strike, beat and abuse the aforesaid judges and clerks, and then and there unlawfully, by force, violence and fraud, did attempt to obtain possession of a large number of ballots then and there being deposited in a lawful manner in the ballot-box, then and there being used at said election by the judges thereof aforesaid.

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Sec. 13353. Possession of forged or altered poll-books, etc.

Whoever has in his possession a falsely made, altered, forged or counterfeited poll-book, tally-sheet, list or election return of an election, knowing it to be such, with intent to hinder, defeat or prevent a fair expression of the popular will at such election, shall be imprisoned in the penitentiary not less than one year nor more than three years. (R. S. § 7062; 67 v. 51, § 2.)

Sec. 13354. Judges may order persons at precinct to disperse.

Whoever, being one of two or more persons congregating in or about a voting place, during the receiving of ballots, so as to hinder or delay an elector in casting his ballot, having been ordered by the judges of election to disperse, refuses so to do, shall be fined not less than twenty dollars nor more than three hundred dollars or imprisoned in jail not more than six months, or both. The judges of election, upon complaint being made that such persons are so hindering or delaying an elector, and being satisfied that there are substantial grounds for such complaint, shall order such persons to disperse. (R. S. § 2951; 74 v. 215, § 14.)

Sec. 13355. Violation or neglect in performance of duty by deputy supervisors or their clerk.

Whoever, being a deputy state supervisor of elections or clerk of such deputy supervisors, upon whom a duty is imposed by law, wilfully or negligently violates or neglects to perform such duty, or wilfully performs it in such a way as to hinder the objects of the law, or wilfully disobeys any law incumbent on him, shall be fined not less than one hundred dollars nor more than one thousand dollars or imprisoned in jail not more than one year, or both. (89 v. 460, § 9; R. S. 2966-9.)

Sec. 13356. Same by public officer.

Whoever, being an official upon whom a duty is imposed by an election law, wilfully or negligently violates or neglects to perform such duty, or wilfully performs it in such a way as to hinder the object thereof, or wilfully disobeys such election laws, for which no specific penalty has otherwise been provided, shall be fined not less than fifty dollars nor more than one thousand dollars or imprisoned in jail not more than one year, or both. (89 v. 450, § 31; R. S. 2966-46.)

When an indictment drawn under favor of §§ 2966-7, 2966-37 and 2950, Revised Statutes, charges in substance that the defendant, being the duly appointed and qualified presiding judge at an election, received a ballot offered by an elector, properly folded, to be by him deposited in the ballot box; and thereupon the defendant unlawfully, fraudulently, knowingly and wilfully unfolded said ballot and looked at the same, and saw for what persons said elector had voted, and

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thereupon disclosed to certain persons how and in what manner and for whom said elector had marked his ballot and voted, such indictment charges an offense which is punishable as prescribed in § 2966-46, Revised Statutes. (G. C. § 13356.) State v. Vause, 84 O. S. 207.

Sec. 13357. Failure of sheriff, etc., to obey order of judges at election.

Whoever being a sheriff, constable, policeman, officer of the peace, or by-stander at an election, fails to forthwith obey and aid in enforcing a lawful order of the judges at an election in relation to persons who congregate or loiter within one hundred feet of a polling place of an election or place of registration of electors, or in relation to the hindering or delaying of an elector in reaching or leaving such place, or in relation to the giving, tendering or exhibiting of a ballot or ticket to a person other than a judge of election within one hundred feet of a polling place, or in relation to the soliciting or attempting to influence an elector as to the casting of his vote, within one hundred feet of a polling place, shall be fined not less than twenty dollars nor more than one thousand dollars or imprisoned in the county jail not less than thirty days nor more than one year, or both. (R. S. §§ 2926f, 2938; 82 v. 234; 83 v. 213; 97 v. 197; 39 v. 13, § 22; 74 v. 215, § 15; 86 v. 368; 97 v. 217.)

Sec. 13358. Delegate or committeeman giving proxy.

Whoever, being a delegate or committeeman chosen at an election provided for by the laws relating to primary elections, gives or issues a proxy or authority to another person to act or vote in his stead, shall be fined not less than twenty dollars nor more than one hundred dollars and imprisoned not less than five days nor more than thirty days. (99 v. 223, § 40.)

Sec. 13359. Acting or voting in place of delegate or committeeman.

Whoever acts or votes in place of a delegate or committeeman chosen at an election provided for by the law relating to primary elections, shall be fined not less than twenty dollars nor more than one hundred dollars and imprisoned not less than five days nor more than thirty days. (99 v. 223, § 40.)

Sec. 13360. When prosecutions must begin.

All prosecutions under this chapter must be commenced within two years after the commission of the act complained of. (98 v. 227, § 35; R. S. § 7066; 76 v. 75, § 5; 86 v. 364; 98 v. 167; 88 v. 467, § 27; 89 v. 452, § 35.)

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CHAPTER XIX.

OFFENSES RELATING TO DOMESTIC ANIMALS.

SECTION
13361. Killing or injuring domestic animals.
13362. Administering poison to domestic animals.
13363. Trespassing animals.
13364. Selling diseased animals; allowing them at large or with other animals.
13365. Selling or permitting diseased sheep at large.
13366. Disposal of diesased bees or infected combs, etc.
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13368. Repealed.
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13372. Prosecution under two preceding sections.
13373. Transporting a hog with cholera.
13374. Importing cattle with "Spanish fever."
13375. Altering ear-marks or brands of domestic animals.
13376. Failure to properly treat animals; penalty; disposition of fines.
13377. Docking tail of horse or pulling out hairs.
13378. Dog-fighting, cock-fighting, etc.
13379. Taking, using, etc., horse, mule, etc., without leave.
13380. Trap shooting with live birds.
13381. "Carrier" pigeons.
13382. Veterinary surgeon.

Sec. 13361. Killing or injuring domestic animals.

Whoever maliciously kills or injures a horse, mare, foal, filly, jack, mule, sheep, goat, cow, steer, bull, heifer, or an ass, ox, or swine, the property of another, if the value of the animal so killed or the injury done is thirty-five dollars or more, shall be imprisoned in the penitentiary not less than one year nor more than five years, or, if such value or injury is less than that amount, shall be fined not less than twenty dollars nor more than two hundred dollars or imprisoned not more than three months, or both. (R. S. § 6851; 54 v. 126, §§ 1, 2; 53 v. 192, §§ 1, 2; S. & C. 74, 75.)

In order to prove the offense of unlawfully, wilfully and maliciously injuring a horse, where it is made to appear that the act charged was cruel and seriously injurious to the animal, and was done wilfully and deliberately for the purpose of gain, it is not necessary to show that the offense was committed from motives of personal malice or ill-will toward the owner. Brown v. State, 26 O. S. 176.

For a person to wilfully and maliciously injure a horse, the property of another, to the amount of seventy-five dollars, by cutting off his mane close to the skin, and his tail as close to the dock as the hair could be cut, when the horse was not trespassing in any close of the person committing the injury, is an offense within the meaning of this section. Oviatt v. State, 19 O. S. 573.

Malice is a necessary ingredient. Mann v. State, 47 O. S. 556, 561; Smith v. State, 1 C. C. (N.S.) 493, 15 O. C. D. 27.

The word "horse" in this section is used in the generic sense and embraces the word "pony," and an indictment charging A with administering paris green to "a certain pony," of the value of $50, the property of B, is not open to demurrer. State v. Miller, 9 N. P. (N.S.) 247.

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FORMS OF CHARGES.

Killing animals.

Did unlawfully, wilfully and maliciously kill a certain (name of the animal), of the value of ——— dollars, the property of one M N, by (set out the means) the said (name of the animal).

Injuring animals.

Unlawfully, wilfully and maliciously did injure a certain (name of the animal), the property of M N, to the value of ——— dollars, by (here set out the means of injury) said (name of the animal).

Sec. 13362. Administering poison to domestic animals.

Whoever, with intent to injure or kill such animal, maliciously administers poison to a horse, mare, foal, filly, jack, mule, sheep, goat, cow, steer, bull, heifer, or an ass, ox, or swine, the property of another, shall be fined not less than fifty dollars nor more than two hundred dollars or imprisoned not more than thirty days, or both. (R. S. § 6852; 53 v. 192, § 3; S. & C. 75.)

Malice is a necessary ingredient. Mann v. State, 47 O. S. 556, 561.

FORM OF CHARGE.

Poisoning animals with intent to injure and destroy the same.

Unlawfully, wilfully and maliciously did administer to a certain (name of the animal), of the value of ——— dollars, the property of one M N, a large quantity, to wit ——— ounces of a certain poison and drug called ——— (or, say, the more particular name and description of which said poison and drug is to the jurors aforesaid unknown), with intent then and there and thereby the aforesaid ——— to injure and destroy (or kill).

Sec. 13363. Trespassing animals.

The next two preceding sections shall not extend to a person killing or injuring an animal mentioned therein or attempting so to do while endeavoring to prevent it from trespassing upon his inclosure, while it is so trespassing or while driving it away from his premises, provided that, within fifteen days thereafter, payment be made for damages done to such animal by such killing or injuring, less the actual amount of damage done by such animal while so trespassing, or a sufficient sum of money be deposited with the nearest justice of the peace within such time to cover such damages. Such deposit shall remain in the custody of such justice until there is a determination of the damages resulting from such killing or injury and from such trespass. Such justice and his bondsmen shall be responsible for the safe keeping of

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such money and for the payment thereof as for money collected upon a judgment and such justice shall be entitled to a fee of five per cent. for acting as such custodian. (R. S. § 6853; 90 v. 140; 54 v. 126, § 3; 53 v. 192, § 4; S. & C. 74, 75.)

Sec. 13364. Selling diseased animals, allowing them at large or with other animals.

Whoever, being the owner or having charge of a horse, mare, foal, filly, jack, mule, sheep, goat, cow, steer, bull, heifer, or an ass, ox, or swine, knowing it to have an infectious or contagious disease, other than foot-rot or scab in sheep, or to have been recently exposed thereto, sells, barters or disposes of it without first disclosing to the person to whom it was sold, bartered or disposed of that it is so diseased or has been so exposed, or knowingly permits it to run at large, or, knowing such animal to be so diseased, permits it to come in contact with such animal of another without his knowledge or permission, shall be fined not less than twenty dollars nor more than five hundred dollars or imprisoned not more than thirty days, or both. (R. S. § 6855; 54 v. 14; 64 v. 207; S. & C. 71; S. & S. 11.)

FORMS OF CHARGES.

Selling or turning at large any domestic animals with contagious disease, or having been exposed thereto.

Being then and there the owner of and having in his charge certain animals, to-wit (name the number and kind of animals), and said animals being then and there † infected with a contagious and infectious disease called ———, and he, the said E F, then and there well knowing that said animals were so infected,† did then and there unlawfully and fraudulently sell and dispose of the said animals to one M N, without first, or at any time or in any manner, informing the said M N that said animals were so infected or diseased.

If it be a case of turning at large, follow the last form to the last †, and then say:—did unlawfully and purposely permit said animals to run at large upon the public highways and commons there situate.

If the animal had only been exposed to infection, then change the words between the † † to the following:—having been recently exposed to a contagious and infectious disease called ———, by being near to other like animals having the said disease and infection, and he, the said E F, then and there well knowing that said animals had then been so recently exposed to said infection and disease, and were thereby then and there likely to become diseased with said infection, and to infect other like animals therewith.

Permitting diseased animals to come in contact with others.

Was the owner of (or, had in his charge) certain animals, to-wit (the number and kind), which said animals were then and there infected with a contagious and infectious disease, called ———, and he, the said E F, then and there well knowing

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that said animals were so as aforesaid infected and diseased, did then and there knowingly and unlawfully permit and cause said animals to come in contact with certain other animals, to-wit (number and names of animals), of one M N, without the permission or knowledge of the said M N.

Sec. 13365. Selling or permitting diseased sheep at large.

Whoever, owning or having charge of a sheep affected with foot-rot or scab, permits it to run upon a highway, common or uninclosed ground or sells it, having reason to believe it is so diseased, without disclosing the fact to the purchaser, shall be fined not more than one hundred dollars and be liable for all damages sustained thereby. (85 v. 336, § 3; R. S. § 4211-26.)

For a discussion of civil liability of a stockyards company, involving a construction of this section, see Neal v. Stockyards Co., 1 C. C. (N.S.) 13, 15 O. C. D. 299 (reversing Neal v. Stockyard Co., 12 O. D. 533).

FORM OF CHARGE.

Permitting diseased sheep to run at large.

Being then and there the owner of (or having charge of) a large number of sheep, said sheep being then and there infected with a certain infectious disease, to-wit, foot-rot (or scab), the said E F well knowing the said sheep to be so affected, wilfully, unlawfully and knowingly did then and there suffer said sheep to run at large upon the public highway, to-wit, on the road leading from ——— to ———.

Sec. 13366. Disposal of diseased bees or infected combs, etc.

Whoever, having diseased bees or their larvæ or affected hives of combs, appliances or utensils for bee keeping, sells, barters or gives them away, or allows them or part thereof to be moved, shall be fined not less than ten dollars nor more than twenty-five dollars. (97 v. 128, § 7; R. S. 4221-19.)

Sec. 13367. Unauthorized disposal of bees, hives, etc.

Whoever, having bees which have been destroyed or treated for foul brood, sells or offers for sale bees, hives or appurtenances of any kind after such destruction or treatment, before being authorized by the bee inspector to do so, or exposes in his bee yard or elsewhere infected comb, honey, or other infected thing, or conceals the fact that such disease exists among his bees, shall be fined not less than ten dollars nor more than twenty-five dollars. (97 v. 128, § 8; R. S. 4221 20.)

Sec. 13368. Repealed, 101 v. 332.

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Sec. 13369. Failure to comply with instructions of inspector.

Whoever, having bees, knowing or having been notified in writing by the bee inspector that foul brood or other infectious or contagious disease exists in a hive in his charge, fails within ten days after such personal knowledge or after receiving such notice, to comply with such notice or cure or destroy such bees, hives or their apppliances, shall be fined not less than ten dollars nor more than twenty-five dollars. (97 v. 128, § 9; R. S. 4221-21.)

Sec. 13370. Bringing cattle with "Texas fever" or disease, wintered in certain states.

Whoever, during the months of March, April, May, June, July, August, September and October, brings or causes to be brought or driven in this state, cattle wintered in the states of Florida, South Carolina, North Carolina, Oklahoma, Georgia, Alabama, Mississippi, Louisiana, Tennessee, Arkansas or Texas, or causes them to be driven or conveyed otherwise than is specified in the next succeeding section, shall be fined not less than one hundred dollars nor more than one thousand dollars and be liable for all damages that may be occasioned by the infection of other cattle with "Texas fever" therefrom. (85 v. 83, §§ 1, 3; R. S. 4211-19-21.)

For a discussion of civil liability of a stockyards company, involving a construction of this section, see Neal v. Stockyards Co., 1 C. C, (N.S.) 13, 15 O. C. D. 299 (reversing 12 O. D. 540).

Sec. 13371. Unloading cattle in certain months forbidden.

Whoever, being a transportation company conveying into or through this state, or a stock yard company receiving cattle specified in the next preceding section, during the months therein named, unloads them in this state for other purpose than to be fed, watered or immediately slaughtered in yards and premises, especially provided for that purpose, located and arranged in conformity to the rules prescribed by the board of live stock commissioners, or permits northern cattle to enter therein or fails to disinfect the cars and quarters used in such transportation in conformity to the rules of such board, or fails to require a statement to be made in each shipping bill showing in what state or territory the cattle were wintered, or to leave at the office of such company nearest the point where such cattle were unloaded a copy of such statement for public inspection, shall be fined not more than five hundred dollars. (88 v. 352, § 7468-37; 85 v. 24, § 4; R. S. 4211-20–22.)

Sec. 13372. Prosecution under two preceding sections.

Upon the request of the board of live stock commissioners, the prosecuting attorney of a county, in which suit is brought, shall prose-

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cute an action for the violation of the provisions of the next two preceding sections and the rules and regulations of the board of live stock commissioners. Proceedings against a railway company under such sections may be had in any county through which a portion of such company's road passes or in which its principal office is situated; and process may be served by leaving a copy at the office of such company within such county. (88 v. 353, § 7468-40; R. S. 4211-23.)

Sec. 13373. Transporting a hog with cholera.

Whoever transports a hog within this state, infected with cholera, shall be fined not more than five hundred dollars or imprisoned in jail not more than six months, or both, and be liable for all damages resulting from such disease thereby. This secton shall not affect common carriers or their employes. (92 v. 388, §§ 1, 2, 3; R. S. 4211-6, 7, 8.)

Sec. 13374. Importing cattle with "Spanish fever".

Whoever, except common cariers not the owners of cattle transported by them, brings into this state cattle infected with the disease, commonly known as the "Texas fever" or "Spanish fever" or cattle liable to infect others therewith, shall be fined not less than fifty dollars nor more than five hundred dollars. (R. S. § 7003; 75 v. 522, §§ 1, 2.)

Sec. 13375. Altering ear-marks or brands of domestic animals.

Whoever maliciously alters or defaces an artificial ear-mark or brand upon a horse, mare, foal, filly, jack, mule, sheep, goat, cow, steer, bull, heifer, or an ass, ox, or swine, the property of another, shall be fined not more than fifty dollars or imprisoned not more than twenty days, or both. (R. S. 6850; 29 v. 144, § 20; S. & C. 430.)

An indictment under this section should set forth the ear-mark or brand, and describe its alteration, or how it was defaced as near as may be. Sewell v. State, Wright, 483.

FORMS OF CHARGES.

Altering an ear-mark.

Did knowingly, wilfully and maliciously alter a certain artificial ear-mark, to-wit (describe the mark), upon a certain (here describe the animal), then and there being, of the value of ten dollars, the property of one M N, by then and there (here describe the alteration), to the great damage of the said M N.

Defacing a brand.

Did knowingly, wilfully and maliciously deface a certain artificial brand, to-wit (describe the brand), upon a certain (here describe the animal), then and there

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being, of the value of ——— dollars, the property of one M N, by then and there (here describe the manner of defacing), to the great damage of said M N.

Sec. 13376. Failure to properly treat animals—Penalty—Disposition of fines.

Whoever overworks, overdrives, overloads, tortures, deprives of necessary sustenance, unnecessarily or cruelly beats, needlessly mutilates or kills, or impounds or confines an animal and fails to supply it during such confinement with a sufficent quantity of good, wholesome food and water, or carries or conveys it in a cruel or inhuman manner, or keeps cows or other animals in an enclosure without wholesome exercise and change of air, or feeds cows on food that produces impure or unwholesome milk, or abandons to die an old, maimed, sick, infirm or diseased animal or works it, or being a person or corporation engaged in transporting live stock, detains such stock in railroad cars or compartments longer than twenty-four hours after they are so placed without supplying them with necessary food, water and attention, or permits such stock to be so crowded as to overlie, crush, wound or kill each other, shall be fined not less than two dollars nor more than two hundred dollars for the first offense, and for each subsequent offense such person shall be fined not less than ten dollars nor more than two hundred dollars or imprisoned not more than sixty days or both. Nothing herein shall prevent the dehorning of cattle. All fines collected for violations of this section shall be paid to the society or association for the prevention of cruelty to animals, if there be such in the county, township, village or city where such violation occurred. (R. S. § 6951; 101 v. 118; 93 v. 15; 89 v. 140; 78 v. 134; 72 v. 129, §§ 1, 2, 4, 5, 6, 8, 22.)

The provisions of the statutes making certain acts of cruelty to animals an offense and affixing a penalty, are constitutional as within the police power of the state. Beamer v. State, 21 C. C. 440; 12 O. C. D. 4.

A defendant convicted of cruelty to animals and sentenced to pay a fine can not, in the criminal action, raise objection to the disposition made of such fine by the state. Beamer v. State, 21 C. C. R. 440; 12 O. C. D. 4.

Acts are not criminal unless the intention accompanies the act, either expressly or by necessary implication from the act itself. Hence, where the owner of animals places them in charge of persons selected with reasonable care and furnishes such persons with the means necessary for the care of such animals, it is a sufficient defense to a charge of wilful cruelty to animals, brought against him under § 6951, Revised Statutes (G. C., § 13376), to show that he did not know that they were not receiving proper care. Muhlhauser v. State, 1 C. C. N. S. 273; 15 O. C. D. 81.

A justice of the peace has jurisdiction, under § 371a, Revised Statutes (G. C., §§ 13478, 13479, 13480), to proceed with the trial of one accused of violating § 6951, Revised Statutes (G. C. § 13376), prohibiting cruelty to animals, upon the filing of the proper affidavit, and without the filing of an information. Muhlhauser v. State, 1 C. C. (N.S.) 273, 15 O. C. D. 81.

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A justice of the peace has jurisdiction of prosecutions for first offense in violation of this section. Ames v. State, 11 N. P. (N.S.) 385, 56 Bull. 165.

In a prosecution under G. C. § 13423, for the offense of cruelty to animals, upon a plea of not guilty, before the justice can acquire jurisdiction to hear the complaint and render final judgment in the case without the intervention of a jury, the accused must waive his right to a jury trial; such waiver must clearly and affirmatively appear upon the record, and it can not be assumed from the silence of the accused, or his mere failure to demand a jury: Simmons v. State, 75 O. S. 346.

In a prosecution under R. S. § 6951 (G. C. § 13376), the complaint should specify the acts done or omitted so as to describe and identify the transaction with reasonable certainty. In cases of torturing and tormenting animals the acts of commission or omission which constitute the offense should be alleged with the allegation that such acts caused unjustifiable pain or suffering to the animal, unless the acts themselves describing the offense necessarily made it evident that such pain or suffering was caused thereby. It is not sufficient to merely use the words, torture and torment. (Burrows, J.)

Several offenses may be charged in the same complaint, but they must be separately stated in such form as to provide a complete and separate setting forth of each offense. (Burrows, J.) Muhlhauser v. State, 1 C. C. (N.S.) 273, 15 O. C. D. 81.

Where the owner of several teams, engaged with different drivers on the same work, is prosecuted and convicted of cruelty to a mule that was being worked with sore shoulders, such conviction can not be set up as a plea in bar to a second prosecution for cruelty on the same day to another mule, which was working in another team and with a different driver. Wood v. State, 10 C. C. (N.S.) 371, 20 O. C. D. 255.

A prima facie case of criminal liability is made against a principal, when it is shown that an act which is made an offense under the statutes was done by his agent in the course of his employment and with the apparent authority of the principal. Wood v. State, 10 C. C. (N.S.) 371, 20 O. C. D. 255.

A dog is an animal within the meaning of this section, notwithstanding he has not been brought within the realm of property by returning him for taxation and paying the tax on him when due as required by G. C. § 5838. Mick v. State, 8 N. P. (N.S.) 54, 19 O. D. 489.

To keep horses in an open field without water or care in the month of December, in the latitude of Cleveland, when the temperature is as low as 16 degrees Fahrenheit, constitutes cruelty to animals within the meaning of this section. Ames v. State, 11 N. P. (N.S.) 385.

A defendant convicted of cruelty to animals and sentenced to pay a fine, can not, in the criminal action, raise objection to the disposition made of such fine by the state; such objection can only be raised by a taxpayer in a proper suit for that purpose. Beamer v. State, 21 C. C. 440, 12 O. C. D. 4.

General Code § 13376, providing for the punishment of one found guilty of cruelty to animals, as therein specified, is constitutional. Gibbs v. State, 18 C. C. (N.S.) 480.

FORM OF CHARGE.

Torturing animal.

Did unlawfully torture a certain animal, to-wit (name the animal), by (set out the means of torturing).

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Sec. 13377. Docking tail of horse, or pulling out hairs.

Whoever, being the owner or having the custody, control or possession of a horse, mare, gelding, foal or filly, or an agent or employe of such owner or custodian, cuts off or causes to be cut off or amputated the skin, flesh, muscles, bone and integuments of the dock or tail thereof, in order to shorten its natural length or proportions, or pulls out or causes to be pulled out the hairs of the foretop, mane or withers thereof, shall be fined not less than twenty-five dollars nor more than two hundred dollars or imprisoned in jail or a workhouse not more than six months, or both, and for each subsequent offense, shall be fined not more than five hundred dollars and imprisoned in jail or a workhouse one year. If it be necessary, in case of accident, malformation or disease affecting the dock or tail of a horse, mare, gelding, foal or filly, such cutting or amputation shall be lawful. (90 v. 138, § 1; R. S. § 6951-1.)

Sec. 13378. Dog-fighting, cock-fighting, etc.

Whoever engages in or is employed at dog-fighting, cock-fighting, bear-baiting, pitting an animal against another, or cruelty to animals, or receives money for the admission of another to a place kept for such purpose, or uses, trains or possesses a dog or other animal for seizing, detaining or maltreating a domestic animal, shall be fined not less than five dollars nor more than one hundred and fifty dollars or imprisoned not less than ten days nor more than thirty days. Whoever knowingly purchases a ticket of admission to such place, or is present thereat, or witnesses such spectacle, shall be an aider and abettor. (R. S. § 6952; 29 v. 161, §§ 11, 12; 72 v. 129, §§ 7, 10, 22; S. & C. 449.)

FORM OF CHARGE.

Cock-fighting.

Did unlawfully and wilfully engage in cock-fighting, by then and there setting two several cocks to fighting with each other.

Sec. 13379. Taking, using, etc., horse, mule, etc., without leave.

Whoever wrongfully takes or unhitches a horse, mare, gelding, foal, filly, or mule, or an ass from a place where such animal has been lawfully hitched or placed, without the consent of the owner thereof, with intent to injure, set at large or use such animal, shall be fined not more than two hundred dollars or imprisoned not more than ninety days, or both. (R. S. § 6854; 65 v. 200, § 1; S. & S. 279.)

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A wrongful taking, and non-consent of the owner, are necessary ingredients in the offense defined in this section. Berry v. State, 31 O. S. 225.

FORM OF CHARGE.

Taking from a hitching rack, stable or pasture.

Did unlawfully and wrongfully take a certain (name the animal), the property of one M N, away from a certain hitching rack where said (name the animal) had then been lawfully fastened, placed and left, and the said E F did, then and there, in manner aforesaid, so take and remove said (name the animal) without the consent of the said M N, then and there the owner thereof, and with the intent to use (or, injure, or, set at large) said (name the animal).

If the animal was taken from a pasture or stable, say:—out of and away from a certain pasture (or, stable) of said M N, wherein said horse (or, mare, etc.,) had then been lawfully fastened, placed and left (etc., the rest of the form will be the same as above).

Sec. 13380. Trap shooting with live birds.

Whoever engages in trap shooting, where and when the object shot at is a living bird or fowl, shall be fined not more than one hundred dollars or imprisoned not more than thirty days, or both. (95 v. 254, §§ 1, 2; R. S. 6952-1, 2.)

Sec. 13381. "Carrier" pigeons.

Whoever, not being the owner thereof, shoots, kills or maims an Antwerp or homing pigeon, commonly known as "carrier" pigeon, or entraps, catches or detains a carrier pigeon, provided it has the name of the owner stamped upon its wing or tail or a band with the owner's name, initial or number on its leg, shall be fined not less than ten dollars nor more than twenty-five dollars. (93 v. 218, § 1; R. S. 7017-2.)

Sec. 13382. Veterinary surgeon.

Whoever engages in the practice of veterinary medicine or surgery in violation of any provision of law, shall be fined not less than ten dollars nor more than twenty-five dollars, and for each subsequent offense shall be fined not less than fifty dollars nor more than one hundred dollars or imprisoned in jail not more than sixty days, or both. This section shall not prohibit veterinary advice or service in cases of emergency, if rendered by a person not entitled to practice or apply to animal castration and dehorning of cattle. (91 v. 392, § 10; R. S. 4412-10.)

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CHAPTER XX.

MISCELLANEOUS OFFENSES.

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Sec. 13383. Libel.

Whoever writes, prints or publishes a false or malicious libel of, or concerning, another, or utters or publishes a false or malicious slander of, or concerning, a female of good repute, with intent to cause it to be believed that such female is unchaste, shall be fined not more than five

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hundred dollars or imprisoned not more than six months, or both. Nothing written or printed shall be a libel unless there is a publication thereof. (R. S. § 6828; 79 v. 84; 64 v. 69; S. & C. 431; S. & S. 279.)

As to constitutional provision relating to the freedom of speech and of the press, see § 11, Art. I.

Libel.—A libel, in reference to individual injury, may be defined to be a false and malicious persecution against an individual, either in print or writing, or by pictures, with intent to injure his reputation, and expose him to public hatred, contempt and ridicule. Where one, falsely and maliciously, orally charges another with anything involving moral turpitude, which, if true, will subject him to infamous punishment, or that tends to exclude him from society, or to prejudice him in his office, profession, trade or business, the parties accused may seek redress by a suit in slander, and recover without proof of actual damage. Whatever charge will sustain a suit for slander, where the words are merely spoken, will sustain a suit for libel, if they are written or printed and published, and it will be seen at a glance that many charges, which, if merely spoken of another, would not sustain a suit for slander, will, if written or printed and published, sustain a suit for libel. Words of ridicule only, or of contempt, which merely tend to lessen a man in public esteem, or to wound his feelings, will support a suit for libel, because of their being embodied in a more permanent and enduring form, of the increased deliberation and malignity of their publication, and of their tendency to provoke breaches of the public peace. Watson v. Trask, 6 O. 531.

A libel is a censorious or ridiculing writing, picture, or sign, made with a mischievous and malicious intent toward government, magistrates or individuals. It does not necessarily charge the plaintiff with crime, for, if its design be wanton and malicious ridicule, and the tendency of the publication to uphold the plaintiff to the scoffs and sneers of society, to degrade him, and lessen his standing in society, an action may well be sustained. So, likewise, if its tendency will naturally excite to passion and revenge, and consequent breaches of the peace. Tappan v. Wilson, 7 O. (pt. 1) 190.

Calling a non-union man a "scab" is not slander or libelous. Boiler Co. v. Benner, 14 O. D. 357.

An owner, or other person, who has the power to control the policy of a newspaper and the right to determine what shall appear in its columns, can not escape liability for a libelous article appearing therein on the ground merely that he had employed other persons to write articles, or that he had a managing editor to supervise the paper. State v. Cass, 5 N. P. 381, 8 O. D. 214.

False and malicious.—Where, on the trial of an indictment for criminal libel, the alleged libelous article appears on its face to be fairly susceptible of either of two constructions, one of which would regard it as charging a criminal offense, and the other construction would regard it as being comment on the acts of public officers of such a character as to be permissible, if made without malice and for justifiable ends, evidence in chief on the part of the state, tending to show that the acts thus criticized were done by the libelees honestly and in good faith, is competent. Boyle v. State, 6 C. C. 163, 3 O. C. D. 397.

A newspaper, or any person, may, with good motives and for justifiable ends, freely and boldly, and with severity, sarcasm or ridicule, comment on and criticize the official action of public officers, and draw any deductions from those actions

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and the circumstances which, with any show of reason or fairness, might be claimed to follow therefrom. Malice will not be presumed from the falsity or injurious character of such criticism or deduction, but malice in fact must be proved in order to render such publication libelous Boyle v. State, 6 C. C. 164, 3 O. C. D. 397.

Where, however, the criticism s not confined to comment on the act itself, but asperses the motives of the officer, and makes statements of fact which amount to a charge against him of an offense against the law, or of a gross infraction of good morals, it is libelous, and the defense available to him who is responsible for a charge is to prove its truth. Boyle v. State, 6 C. C. 164, 3 O. C. D. 397.

When the language of an alleged libelous article is fairly susceptible of either of two constructions, one of which would hold it unqualifiedly libelous, and the other as being such as to require proof of actual malice to give it a libelous character, the question of its true interpretation should be left to the jury under proper instructions, and it is error, in such case, for the court to instruct the jury that such publication is libelous and actionable. Boyle v. State, 6 C. C. 164, 3 O. C. D. 397.

In the case supposed in the foregoing paragraph, it is competent for the state to introduce in chief such evidence as would be proper in case the publication were, confessedly, one of qualified privilege. Boyle v. State, 6 C. C. 164, 3 O. C. D. 397.

To convict one of libel published in a newspaper, it must appear that the defendant either owned or controlled the paper, that the libelous matter appeared in such paper on or about the date alleged, and that the article complained of is either untrue or malicious. State v. Harris, 56 Bull. 86, 7 O. L. R. 626.

Truth is not alone a sufficient defense, but it must also appear that the motive in publishing the matter is good and the end sought is justifiable. State v. Cass, 5 N. P. 381, 8 O. D. 214.

Innuendo.—The office of the innuendo is to direct to its object the charge made. It can neither enlarge nor restrain the natural sense and import of the words used; if they do not convey the sense and meaning, when their application is explained, the innuendo can not aid them. Tappan v. Wilson, 7 O. (pt. 1) 190.

Where the language complained of as libelous will bear the meaning ascribed to it by the innuendo, whether such was the meaning intended, is a question of fact for the jury. State v. Smiley, 37 O. S. 30.

Whether the language of an article printed and published in a newspaper is susceptible of a libelous meaning or not, is a question of law for the court; whether it was, in fact, used in the particular case with a libelous meaning, when the words are not so clear, direct, and unambiguous as to afford no opportunity but for one construction, is a question of fact for the jury. Boyle v. State, 6 C. C. 164, 3 O. C. D. 397.

If the words of the publication are reasonably susceptible of the meaning ascribed to them by the innuendo in a petition for libel or slander, then the innuendo will be taken as expressing the meaning as ascribed until disproved. Cleveland Retail Grocers' Association v. Exton, and Godfrey v. Exton, 18 C. C. 321, 10 O. C. D. 145.

Privileged publications.—Where motives are good and the end justifiable, any person may criticise with severity, sarcasm or ridicule, the official action of public officers, and from their conduct draw any conclusions which, with reason and fairness, may be claimed to follow therefrom. Boyle v. State, 6 C. C. 163, 3 O. C. D. 397.

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Where criticism of a public officer is not confined to his acts alone, but aspersions are cast upon his motives and he is charged with crime, or of a gross infraction of good morals, it is libelous. Boyle v. State, 6 C. C. 163, 3 O. C. D. 397.

A public officer may be criticised by a newspaper even to the point of severity or ridicule, but where the matter published is libelous neither general report, nor public rumor, nor information and belief will afford justification. State v. Harris, 56 Bull. 86, 7 O. L. R. 626.

An allegation in a petition charging an attorney and his client with conspiring together for corrupt and fraudulent purposes, where it is relevant and pertinent to the case, is privileged. Rudin v. Fauver, 9 N. P. (N.S.) 289, 20 O. D. 194.

Utter and publish.—The rule of the common law of England which, before the act of Parliament of the 6th and 7th Victoria, commonly called "Lord Campbell's Act," held the proprietor of a newspaper conclusively liable criminally for any libelous article appearing therein, was never in force in this state. Boyle v. State, 6 C. C. 164, 3 O. C. D. 397.

The manager or editor of a newspaper is prima facie criminally liable for libel published therein, and can not escape responsibility simply by showing that it was published without his knowledge or consent. It is incumbent upon him to show that the publication did not occur through any neglect or want of ordinary care on his part. Ickes v. State, 16 C. C. 31, 8 O. C. D. 442.

Indictment.—The indictment must set forth an exact copy of the libel. If there is any excuse why the libel can not be set out in the exact words of the same, the facts constituting that excuse must be distinctly averred in the indictment and proved upon trial. Dana v. State, 2 O. S. 91.

Where the matter is so indecent and immoral in its nature that the same would be offensive to the court, an exact copy need not be inserted in the indictment, and it is sufficient to describe the language used and state its purport and effect. State v. Zurhorst, 75 O. S. 232.

Where the language used is fairly susceptible of either of two constructions, only one of which is libelous, the burden is upon the state to prove the actual falsity of the charge, or such other facts as would show actual malice in its publication. Boyle v. State, 6 C. C. 163, 3 O. C. D. 397.

See, also, State v. Cass, 5 N. P. 381, 8 O. D. 214.

Under an indictment charging that the accused used, uttered and published a false and malicious slander of and concerning a female of good repute with intent to cause it to be believed that such female was unchaste, evidence offered by the accused of specific acts of illicit carnal intercourse on the part of the female which came to his knowledge immediately before the speaking of the words is admissible. Lambright v. State, 9 C. C. (N.S.) 151, 19 O. C. D. 93.

FORMS OF CHARGES.

Publishing false and malicious libel.

Unlawfully and maliciously did write, print, and publish a certain false and malicious libel of and concerning one M N; which said false and malicious libel is as follows, that is to say (here set out the libel, with such innuendoes as may be necessary to fix its meaning).

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Stating transaction by way of inducement.

Sometimes it is necessary, when a libel relates to a particular transaction, to state the transaction by way of inducement, so as to render the libel intelligible, and show that it has relation to the prosecutor. It is thus stated, that the grand jurors, etc., "present, that before the commission of the offense hereinafter mentioned" (state the transaction alluded to): "and that E F, well knowing the premises, but intending to vilify and defame the said M N, on the ——— day of ———, A. D. 19—, unlawfully and maliciously did write," etc., as in the above form.

Sec. 13383-1. False statement affecting solvency of banks or value of stocks and bonds; penalty.

Whoever, directly or indirectly, wilfully and knowingly makes or transmits to another, or circulates, or counsels, aids, procures or induces another to make, transmit or circulate, any false or untrue statement, rumor or suggestion derogatory to the financial condition, solvency or financial standing of any bank, savings bank, banking association, building and loan association or trust company, doing business in this state, or with intent to depress the value of the stocks, bonds or securities of any corporation, directly or indirectly, wilfully and knowingly makes or transmits to another, circulates, or counsels, aids, procures or induces another to make, transmit or circulate, any false or untrue statement, rumor or suggestion derogatory to the financial condition, or with respect to the earnings or management of the business of any corporation, or resorts to any fraudulent means with intent to depress in value the stocks, bonds or securities of any corporation shall be fined not more than one thousand dollars or imprisoned in the penitentiary not more than two years, or both. (101 v. 263; 103 v. 469.)

Under that part of the provisions of G. C. § 13383-1 (103 v. 469), relating to banking institutions, building and loan associations or trust companies, the intent of the accused is not material, but it is made a material element of the further offense defined by this section against any corporation. State v. Kollar, 93 O. S. 89.

If the statement, rumor or suggestion, derogatory to the financial condition, solvency or financial standing of any bank, banking association, building and loan association or trust company doing business in this state, is false, and the accused, directly or indirectly, wilfully and knowingly, made and transmitted it to another, or circulated the same, then he is guilty of the offense charged. If the statement, rumor or suggestion is true, then he is not guilty of this offense, regardless of the intent and purpose with which it is made or transmitted to another or circulated. State v. Kollar, 93 O. S. 89.

In a prosecution under that part of the provisions of G. C. § 13383-1 (103 v. 469), relating to banking institutions, building and loan associations or trust companies, the burden is upon the state to prove, beyond a reasonable doubt, that the statement, rumor or suggestion, which the indictment charges the defendant with having made, transmitted or circulated, is false. State v. Kollar, 93 O. S. 89.

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Sec. 13384. Blackmailing.

Whoever, with menaces, orally or by written or printed communication, sent or delivered by him, demands of another a chattel, money or valuable security, or accuses, or knowingly sends or delivers a written or printed communication, with or without a name, or with a letter, mark or designation, accusing or threatening to accuse, another of a crime punishable by law, or of immoral conduct, which, if true, would tend to degrade and disgrace such person, or threatening to expose or publish any of his infirmities or failings, or to subject him to the ridicule or contempt of society, or to do any injury to the person or property of another, with intent to extort or gain from him a chattel, money or valuable security or a pecuniary advantage, or, with intent to compel him to do an act against his will, may be fined not more than one thousand dollars and shall be imprisoned in the penitentiary not less than one year nor more than five years. (R. S. § 6830; 76 v. 167, § 22.)

Accusation.—The object of this section is to forbid persons from assuming the character of prosecutors of crime, for the purpose of extorting gain to themselves. It declares that any one who makes an accusation of crime with this intent shall be deemed guilty of an attempt to rob. If this is the motive, it is immaterial whether the accusation be true or false. Elliott v. State, 36 O. S. 322.

The offense consists of an attempt to rob by means of an accusation of a crime, and is complete, whether it is successful or not. Elliott v. State, 36 O. S. 323.

On a charge of threatening to accuse, the words of the statute would seem to require that the accusation should be in writing. Elliott v. State, 36 O. S. 324.

Where the accusation is directly made with the unlawful intent, whether verbally or in writing, the crime is complete. Elliott v. State, 36 O. S. 324.

When the accusation is of immoral conduct, it must be of such a nature as would tend to degrade or disgrace. Every accusation of immoral conduct, with intent to extort gain, is not prohibited but only when such immoral conduct is charged as tends to degrade and disgrace. Elliott v. State, 36 O. S. 323.

Where the accusation is of a crime punishable by law, no averment that the accusation tended to degrade and disgrace is necessary. Elliott v. State, 36 O. S. 323.

A demand made by the owner upon the offender, for a reasonable compensation for property criminally destroyed by the latter, the owner at the time accusing him of the crime, and threatening to prosecute him therefor if the demand is not complied with, does not come within the provision of R. S. § 6830. Mann v. State, 47 O. S. 556.

The crime of blackmailing under R. S. § 6830, may be committed in two ways: 1st. Whenever a person accuses any person of a crime punishable by law, or of any immoral conduct, etc., with intent to extort or gain from such person any chattel, money, etc. 2d. Whenever a person knowingly sends or delivers any letter or writing, or any printed or written communication, with or without a name, or with any letter, mark or designation, accusing or threatening to accuse any person of a crime punishable by law, etc., or to do an injury to the person or

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property of any person with intent to extort or gain, etc. Jones v. State, 14 C. C. 363, 7 O. C. D. 716.

Verbally accusing a treasurer of a corporation with being "short" in his accounts is an accusation of embezzlement, and if accompanied by a demand for money, the unlawful intent constitutes blackmail. State v. Ford, 55 Bull. 294, 7 O. L. R. 598.

A threat may be made by means of innuendo or suggestion, as well as by expressed language. In re Disbarment Proceedings v. Burke, 17 C. C. 315, 9 O. C. D. 350.

Conspiracy.—This crime belongs to the class that may be committed by one or more persons, and for which they may be jointly indicted without alleging a previous conspiracy. Elliott v. State, 36 O. S. 324.

Where several persons are jointly indicted for blackmailing, one of the defendants can not be convicted upon the acts and declarations of another defendant, unless a conspiracy between them is first proved. Ditzler v. State, 4 C. C. 551, 2 O. C. D. 702.

Intent.—Where one is indicted for accusing or threatening to accuse another of a crime punishable by law, with intent to extort or gain from him money or other valuable thing, the truth of the accusation may be material for the defense, in determining the intent with which the defendant made the accusation. Mann v. State, 47 O. S. 556.

The evidence must show that a verbal accusation of a crime was made with intent to extort chattels, money or valuable security. State v. Ford, 55 Bull. 294, 7 O. L. R. 598.

Where there is a verbal accusation of crime, with intent to extort, it is no defense that the charge was true. State v. Ford, 55 Bull. 294, 7 O. L. R. 598.

In the crime of blackmail it matters not whether the charge is true or false if it was made for the purpose of extorting money. English v. English, 9 Dec. Rep. 167, 11 Bull. 133.

Belief in the guilt of the person threatened with exposure is not a defense to the crime of blackmail where the other elements are presented. In re Disbarment Proceedings v. Burke, 17 C. C. 315, 9 O. C. D. 350.

It is not necessary to aver that the accusation made is false. Elliott v. State, 36 O. S. 318.

Indictment.—An indictment which specifically charges that A, B, and C, with the intent to extort and gain a certain amount of money, of the value of $500, and certain valuable securities of the value of $300, the property of W, did wilfully and feloniously accuse W of the crime of burning his barn, which was insured, and was of the value of $350, with intent thereby to prejudice the insurer, is not defective for want of any of the following averments: 1. For want of an averment that the accusation against W was false. The truth or falsity of the accusation made by the defendants is not an essential element of the crime. 2. Nor because it does not state the name of the insurer or the amount of the policy. 3. Nor because it does not allege that defendants succeeded in extorting money, chattels, or valuable securities. 4. Nor for want of an averment that the crime of which W was accused tended to degrade or disgrace him. 5. Nor for want of an averment that the accusation of such crime was in writing. 6. Nor because there was no averment of a previous conspiracy by the defendants to commit the crime. Elliott v. State, 36 O. S. 318.

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In an indictment under R. S. § 6830, for verbally accusing another of a crime punishable by law, to-wit, administering poison to and thereby killing two colts, the property of the defendant, with the intent to extort and gain from the accused certain chattel property and pecuniary advantage, the words, "punishable by law," are not a sufficient averment of the crime, but the act of which the party was accused must be alleged as having been done maliciously, and with intent to injure and destroy the animals, and without such allegation the indictment is insufficient. Mann v. State, 47 O. S. 556.

The words, "tends to degrade and disgrace such person," as used in R. S. § 6830, is a part of the description of the offense, and should be pleaded, or words that are equivalent. Ditzler v. State, 4 C. C. 551, 2 O. C. D. 702.

In an indictment under R. S. § 6830 (G. C. § 13384), for threatening to accuse another of a crime punishable by law, an averment that defendant threatened verbally and in writing to accuse another of burning his own building with intent to defraud, is not sufficient to charge a crime under the statute, but the indictment must show that the building was insured and that the defendant threatened to charge the owner with burning it with intent to prejudice the insurer, and without such allegation the indictment is insufficient. Smith v. State, 1 C. C. (N.S.) 493, 15 O. C. D. 22.

G filed his affidavit against H, and others, before a justice of the peace, charging them with a violation of R. S. § 6830 (G. C. § 13384), (blackmailing), on the second day of January, 1901, in unlawfully menacing and threatening G with personal violence with the intent thereby to extort money from him. The case was heard by the justice, and the parties, including H, were held to answer said charge before the court of common pleas. At the next term of said court, G appeared before the grand jury and gave and furnished evidence to support said charge, upon which the grand jury found and returned an indictment for the same; and at the same time, on the same evidence and covering the same alleged criminal transaction of the second of January, 1901, the grand jury found and returned an indictment against the same parties, for assaulting G with intent to rob him, in violation of R. S. § 6821 (G. C. § 12421). The indictment for blackmailing was quashed on the second day of March, 1901. On the fourteenth day of August, 1901, H, one of the accused parties, commenced his action against G to recover damages for malicious prosecution on account of the said proceedings before the justice and the court of common pleas; but the indictment against H and the others for assaulting G with intent to rob him was still pending and was not disposed of until November 25, 1902.

Held: That the indictment for assault with intent to rob was a continuation of the criminal prosecution started before the justice of the peace, and the same was not legally terminated when said action was commenced. Gaiser v. Hurleman, 74 O. S. 271.

To establish the charge of blackmail it must be shown that the defendant intended by the accusation made unlawfully and feloniously to extort money from the person named, at or about the time charged and by the use of substantially the words charged. State v. Ford, 7 O. L. R. 598.

The guilt of a defendant charged with blackmail in nowise depends upon the truth of the accusation made. State v. Ford, 7 O. L. R. 598.

A charge that a person designated is "short" constitutes a charge that he is guilty of embezzlement, if it was intended to convey the idea that he had unlawfully and intentionally converted the moneys of another to his own use. State v. Ford, 7 O. L. R. 598.

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FORM OF CHARGE.

Sending letter threatening to accuse a person of a crime

Unlawfully and knowingly did threaten one E F to accuse the said E F of having committed the crime of (here set forth the crime), by then and there wilfully and knowingly sending to the said E F a certain written communication, which said written communication is as follows, that is to say (here set out the writing verbatim), with intent thereby then and there, unlawfully, wilfully, and knowingly, to extort money from the said E F.

Sec. 13385. Sending threatening letters.

Whoever knowingly sends or delivers a writing for the purpose of extorting money or other valuable thing, or containing wilful and malicious threats of injury, shall be fined not more than five hundred dollars or imprisoned not more than thirty days, or both. (R. S. § 6829; 29 v. 144, § 23; S. & C. 430.)

Writing.—In order to bring a letter, sent or delivered, within the terms or meaning of this section, it must, on its face, contain a threat of injury of some kind, or the communcation must be of such a nature as is calculated to extort money or other valuable thing. Brabham v. State, 18 O. S. 485.

Extorting money.—On the trial of a defendant charged with sending a letter containing threats of injury, or with the intent or for the purpose of extorting money or other valuable thing, it is not competent for the state to prove that at an interview subsequent to the sending and receiving of the letter, threats were orally made by the defendant to the party to whom the letter was sent, which did result, wrongfully or rightfully, in extorting a valuable thing. Brabham v. State, 18 O. S. 485.

Indictment.—A correct copy of the writing should be set out in the indictment; if there is any excuse why that cannot be done, the facts constituting that excuse must be distinctly averred in the indictment, and proved upon trial. Dana v. State, 2 O. S. 91; Stephens v. State, Wright 73.

FORMS OF CHARGES.

Sending writing containing threats of injury to the person.

Unlawfully, knowingly, and willfully did send to one M N a certain writing, containing willful and malicious threats of injury to the person of the said M N to-wit: (here set forth the particular injury threatened); which said writing is as follows, that is to say (here set out the writing verbatim).

Sending a writing containing threats of injury to property, with intent to extort money.

Unlawfully and knowingly did send to one M N a certain writing containing willful and malicious threats of injury to the property, to-wit, the dwelling-house of the said M N, with intent and for the purpose of extorting money, to-wit, the sum of ——— dollars, from the said M N, which said writing is as follows, that is to say (here copy the writing verbatim).

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Sec. 13386. Threats to abduct, wound or kidnap.

Whoever, either orally or by written or printed communication, maliciously and wilfully threatens to abduct, kidnap, wound, maim, kill or murder another person or one related by blood, marriage or adoption to such person, with intent thereby to extort money, goods, chattels or other things of value, shall be imprisoned in the penitentiary not less than three years nor more than twenty-five years. (95 v. 648, § 2; R. S. 6830-2.)

Sec. 13387. Threats to destroy property for extortion.

Whoever, either orally or by written or printed communication, maliciously and wilfully threatens to burn, injure or destroy a building or other property of another with the intent thereby to extort money, goods, chattels or anything of value, shall be imprisoned in the penitentiary not less than one year nor more than ten years. (95 v. 649, § 3; R. S. 6930-3.)

Sec. 13388. Divulging telegraph message.

Whoever, being connected with a telegraph or messenger company, incorporated or unincorporated, operating a telegraph line or engaged in the business of receiving and delivering messages, wilfully divulges the contents or the nature of the contents of a private communication entrusted to him for transmission or delivery, or wilfully refuses or neglects to transmit or deliver it, or wilfully delays its transmission or delivery, or wilfully forges the name of the intended receiver to a receipt for such message or communication or article of value entrusted to him by said company, with intent to injure, deceive or defraud the sender or intended receiver thereof or such telegraph or messenger company or to benefit himself or any other person, shall be fined not more than five hundred dollars or imprisoned in jail not more than three months. (R. S. § 3466; 94 v. 209; 62 v. 72, § 10; S. & S. 156.)

Sec. 13389. Delaying telegraph message.

Whoever, being a telegraph operator or a railroad or telegraph company, in case of an accident to a railroad train by which a passenger is delayed, fails, neglects or refuses, on tender of the usual charge at regular commercial offices, to accept a telegram for transmission from any person so delayed, or to send it forthwith to the person and point designated, without alteration, revision or approval, shall be fined not less than fifty dollars nor more than five hundred dollars. If such

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violation arises from obeying an order or rule of his employer, such employer shall repay to him such fine and costs. (88 v. 429, § 3; R. S. § 3373-2.)

Sec. 13390. Profane swearing.

Whoever, being over fourteen years of age, profanely curses or swears by the name of God, Jesus Christ or the Holy Ghost, on complaint made within ten days thereafter, shall be fined not more than one dollar for each offense. (R. S. § 7031; 29 v. 161, §§ 4, 14; S. & C. 448, 449.)

Sec. 13391. Grave robbing.

Whoever, wilfully and unlawfully opens a grave or tomb where a corpse has been deposited, or removes a corpse from its sepulchre, or knowingly delivers a corpse so unlawfully removed to a person for medical or surgical study, or receives, conceals or secretes a corpse, knowing it to have been so removed or delivered, shall be imprisoned in the penitentiary not less than one year nor more than five years. (R. S. § 7034; 77 v. 85; 44 v. 77, § 1; 67 v. 25, § 3; S. & C. 437.)

For a conviction under this section, reversed because of insufficient evidence, see Schneider v. State, 40 O. S. 336.

FORM OF CHARGE.

Removing a body from its grave.

At the township of ———, in said county, without lawful authority, the body of one M N, deceased, from its grave, there situate, in which it had then lately before been deposited, and then was, did willfully remove, take, and carry away.

Sec. 13392. Anatomical demonstration upon a corpse.

Whoever assists in a surgical operation or anatomical experiment or demonstration upon a corpse, knowing it to have been unlawfully obtained, shall be fined not less than one hundred dollars nor more than one thousand dollars or imprisoned not less than six months nor more than one year, or both. (R. S. § 7034; 77 v. 85; 44 v. 77, § 1; 67 v. 25, § 3; S. & C. 437.)

Sec. 13393. Public dance, roller skating or like entertainment without permit

Whoever gives a public dance, roller skating or like entertainment in a building, hall, room or rink in a city or village without having previously obtained a permit from the mayor thereof, or permits another so to do, or, being the owner or lessor of a building containing a dance hall, room or rink fails to post in a conspicuous place therein a copy

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of this section, shall be fined not less than fifteen dollars nor more than one hundred dollars or imprisoned not more than sixty days, or both. (R. S. §§ 6945a, 6945c; 98 v. 61, 62.)

Sec. 13394. Exhibitions and temporary business near fairs prohibited.

Whoever exhibits or shows a natural or artificial curiosity for price or gain, or sets up to let or uses for profit a swing, revolving swing, flying horses, whirligigs or other device, or establishes a temporary place of business for the sale of an article or offers it for sale, not being a regularly established dealer therein at his usual place of business, within one-fourth of a mile of a fair or an agricultural society, not having obtained written permission so to do from the board of such society, shall be fined not less than one dollar nor more than one hundred dollars. (R. S. § 7006; 89 v. 135; 58 v. 65, §§ 1, 2; S. & S. 5.)

Ohio R. S. § 7006 (G. C. § 13394) which provides that, "whoever establishes a temporary place of business for the sale of any article whatsoever, or offers for sale any such article within one-fourth of a mile of the fair ground of any agricultural society, while the fair of such society is being held therein, unless he has obtained the written permission of the board of such society" and imposing a penalty for the violation thereof, is an unconstitutional exercise of power by the legislature.

Such provision violates Art. XIV, § 1, of the federal constitution, because it abridges the privileges and immunities of citizens, deprives them of their property without due process of law, and denies to each the equal protection of the law.

The delegation of power to the board of such fair to determine who shall do the forbidden act is an unlawful restriction upon a lawful business giving the board the power to destroy competition and create a monopoly and deprive the citizen of a right guaranteed to him by Art. I, § 1, of the bill of rights, of enjoying and possessing his property. Markley v. State, 21 O. C. D. 225.

Sec. 13395. Exhibiting puppet shows, etc., for money.

Whoever exhibits a puppet show, wire-dancing, tumbling, juggling or sleight of hand, and asks and receives money or other property therefor shall be fined not more than ten dollars. (R. S. § 7005; 29 v. 161, § 8; S. & C. 449.)

Sec. 13396. Keeper of public house permitting nine-pin alley.

Whoever, being the keeper of a public house, or retailer of spirituous liquor, establishes, keeps or permits to be kept upon his premises, a ball or nine-pin alley, or is interested therein when upon the premises of another, shall be fined not less than ten dollars nor more than one hundred dollars. This section shall extend to any alley denominated a

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nine-pin alley whether such alley is used for playing therein a greater or less number than nine pins. (R. S. § 7000; 29 v. 161, § 7; S. & C. 448.)

Keeping a nine-pin alley in a town by the keeper of a public house, being unlawful, the builder of such alley can not recover therefor upon general assumpsit. Spurgeon v. McElwin, 6 O. 442.

Where a lessee maintains a bowling alley in connection with his saloon, the sale of liquors is not rendered unlawful, and the lease is not necessarily void under G. C. § 6211. Shoemaker v. Becker, 16 O. D. 82, 3 O. L. R. 14.

Since this section forbids a bowling alley in connection with a saloon, an agent of a brewing company will not be presumed to have authority to make a contract on behalf of such brewing company for the construction of a bowling alley to be used in connection with a saloon belonging to a third person. Brewing Co. v. Brunswick-Balke-Collender Co., 18 C. C. (N.S.) 255.

FORM OF CHARGE.

Keeping a nine-pin alley.

Then and there being a keeper of a public house, to-wit, a tavern, in the State of Ohio, to-wit, in the county of ———, aforesaid, did unlawfully establish and keep, and permit to be kept, upon his lot and premises appendant to the said public house, a certain nine-pin alley, commonly known and denominated as a nine-pin alley, by then and there establishing and keeping the same, and permitting it to be kept for the use and purpose then and there of playing at a certain game commonly called nine-pins, and for the use and purpose then and there of playing at a certain game commonly denominated nine-pins, by playing therein a greater number than nine pins, to-wit ten pins.

Sec. 13397. Unlawful camping on public highways or adjacent lands.

Whoever, being a gypsy, wanderer, traveler or other person, camps in a tent, wagon or otherwise, or builds, makes or starts a fire on the public highway or lands adjacent thereto without first having obtained the written consent of the agent, manager or owner of the land abutting on such highway where such camp or fire is made, shall be fined not more than ten dollars or imprisoned in jail not more than thirty days or both. (92 v. 88, § 2; 99 v. 86, § 1; R. S. § 6884-1, 2.)

Sec. 13398. Penalty for violations by second-hand dealers.

Whoever violates any provision of sections 6370 to 6373 inclusive of the General Code, shall be fined not less than twenty-five dollars nor more than one thousand dollars and the costs of prosecution, and upon the default of payment of fine and costs shall be committed to the jail of the county or to some workhouse and there be confined one day

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for each dollar of fine and costs against him. (R. S. § 4414; 61 v. 128; 74 v. 31; S. & S. 821; 107 v. 178.)

The provisions of G. C. § 6371, requiring junk dealers to retain certain articles thirty days before selling, are not an unreasonable exercise of the police power, and are therefore constitutional. Phillips v. State, 77 O. S. 214.

A police court affidavit charging a violation of G. C. § 6371, requiring junk shop dealers to keep certain metals for thirty days, need not expressly negative the language of the statute, or allege that he did not retain such articles for the required period. An averment that defendant failed and neglected to retain such articles for such period is sufficient. Neifeld v. State, 3 C. C. (N.S.) 551, 13 O. C. D. 246.

A fine of $50.00 for failure to conform with the requirements of G. C. § 6371, that certain goods must be kept on hand for thirty days is not excessive or an abuse of discretion. Phillips v. State, 4 N. P. (N.S.) 398, 16 O. D. 763 (affirmed, 77 O. S. 214).

Sec. 13399. Trading stamps.

Whoever violates any provision of law relating to trading stamps shall be fined not less than fifty dollars nor more than one hundred dollars. (97 v. 278, § 4; R. S. § 4427-16.)

Sec. 13400. Pawnbroker.

Whoever violates any provision of law relating to pawnbrokers shall be fined not less than ten dollars nor more than two hundred dollars. (R. S. §§ 4396, 6999; 66 v. 224, § 451.)

The general assembly has power, subject to the limitations of § 18 of the schedule to the constitution, to regulate by license and to compel, by imposition of a fine, payment of a reasonable fee, where a special benefit is conferred by the public upon those who follow an occupation, or where the occupation imposes special burdens on the public, or where it is injurious or dangerous to the public. The statute requiring dealers in second-hand articles and keepers of junk shops to pay a license is constitutional. Marmet v. State, 45 O. S. 63.

Sec. 13401. Interference with surveyor.

Whoever molests a county surveyor or his deputy or prevents him from performing his official duty by threats or improper interference, shall be fined not more than one hundred dollars and be liable for all damages sustained by any person by the hindrance of such surveyor or deputy, and all expenses and costs that accrue in consequence of the attendance of the sheriff, who, upon the call of such surveyor or deputy, shall accompany and protect him. (R. S. § 1170; 29 v. 399, § 10; S. & C. 1421.)

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A supervisor of roads and highways is an officer within the meaning of § 9 of the act of March 8, 1831 (S. & C. 428), which provides as follows: "That if any person shall abuse any judge or justice of the peace, resist or abuse any sheriff, constable or other officer in the execution of his office, the person so offending," etc. To constitute the offense of resisting an officer, under the above section, it is not necessary that the officer should be assaulted, beaten or bruised. Woodworth v. State, 26 O. S. 196.

Sec. 13402. Unlawfully interfering, etc., with telegraph or telephonic messages.

Whoever wilfully and maliciously cuts, breaks, taps or makes connection with a telegraph or telephone wire or reads or copies in an unauthorized manner, a telegraphic message or communication from or upon a telegraph or telephone line, wire or cable, so unlawfully cut or tapped, or makes unauthorized use thereof, or wilfully and maliciously prevents, obstructs or delays the sending, conveyance or delivery of an authorized telegraphic message or communication by or through a line, cable or wire, under the control of a telegraph or telephone company, shall be fined not less than fifty dollars nor more than one thousand dollars or imprisoned not less than one year nor more than three years, or both. (R. S. § 3467a; 89 v. 52; 89 v. 100; 90 v. 346; 95 v. 101.)

Sec. 13403. Watercraft as residence or for traffic without license.

Whoever lives in or occupies a boat or watercraft, not propelled by steam, as a residence or abode, or for engaging in business, trade or traffic on any of the navigable waters or their tributaries within the jurisdiction of this state unless a license has been granted to him by the probate court of the county in which it lies or plies, to live in or occupy it as a residence or abode and to engage in the business, trade or traffic therein specified, shall be fined not less than twenty-five dollars nor more than one hundred dollars or imprisoned not less than ten days nor more than ninety days, or both. (92 v. 208, §§ 1, 8; R. S. § 4385-1-8.)

Sec. 13404. Auctioneer failing to make payment to the county treasurer.

Whoever, being an appointed and licensed auctioneer, neglects or refuses to exhibit a quarterly account, or to deliver it, verified as required by law, or neglects or refuses to pay the lawful duties to the treasurer of the proper county within the legal time, shall be fined not more than one thousand dollars and forfeit his license. He shall also

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be liable for such duties in an action brought in the name of the state. (R. S. § 7012; 38 v. 50, § 10; S. & S. 26.)

Sec. 13405. Auctioneer farming out office.

Whoever, being an appointed and licensed auctioneer, farms out his office to another, or derives profit or advantage from sales by auction made by another, other than his clerk in case of the sickness or necessary absence of such auctioneer, shall be fined one thousand dollars and forfeit his license. (R. S. § 7013; 72 v. 66, § 9.)

Sec. 13406. Connecting bridges to Ohio shore of Ohio river.

Whoever connects a bridge over the Ohio river with the Ohio shore thereof, or attaches it thereto, unless it has an unbroken and continuous span of not less than four hundred feet over the main channel thereof, shall be fined ten thousand dollars. (R. S. § 6996; 66 v. 71, §§ 1, 2.)

Sec. 13407. Keeping ferry without license.

Whoever keeps a ferry across a stream running through or bounding on a county, without having previously obtained a license from the court of common pleas of such county for that purpose, as provided by law, shall be fined not more than thirty dollars. (R. S. §§ 4265, 4256; 29 v. 447, § 10; S. & C. 655; 29 v. 447, § 1; S. & C. 653.)

Sec. 13408. Tramps.

Whoever, not being a female or blind person and not being in the county in which he usually lives or has his home, begs or asks subsistence by charity and enters a dwelling house, or yard or enclosure about a dwelling house, without the permission of the owner or occupant thereof, or does not, when requested, forthwith leave such place, or is found carrying a fire-arm or dangerous weapon, or does or threatens to do injury to the person or property of another, shall be imprisoned in the penitentiary not less than one year nor more than three years. A person, upon view, may apprehend such offender and take him before a justice of the peace, or other examining officer, for examination. (R. S. § 6995; 76 v. 191, §§ 1, 2, 3, 4.)

Section 6995, Revised Statutes, commonly known as the tramp law, whereby punishment is prescribed for threatening to do injury to the person of another by a tramp, is not in conflict with the Ohio bill of rights, nor with § 26, of Art. 2, of the constitution, nor with the fourteenth amendment to the constitution of the United States. State v. Hogan, 63 O. S. 202.

An offender under this section who kills an officer attempting to arrest without warrant is guilty of manslaughter. State v. Pate, 7 N. P. 543, 5 O. D. 732.

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Sec. 13409. Vagrants.

Whoever, being a male person able to perform manual labor, has not made reasonable effort to procure employment or has refused to labor at reasonable prices, is a vagrant or common beggar and shall be fined not more than fifty dollars and sentenced to hard labor in jail until the fine and costs are paid. For such labor he shall receive credit upon such fine and costs at the rate of seventy-five cents per day. (R. S. § 6994; 72 v. 165, § 1.)

The ordinance of the city of Cleveland, purporting to define "a suspicious person," is a valid ordinance. Welch v. Cleveland, 97 O. S. 311.

While cities are without authority to punish loiterers as such, they have ample authority to punish vagrants, and an ordinance passed in the exercise of such power is not invalid because the word "loitering" is used in defining the offense, and in creating the class of vagrants contemplated. Bader v. McCartin, 6 O. A. R. 76.

This section, defining vagrancy and providing for the fining and imprisonment of vagrants, is indefinite to a degree which renders its enforcement impracticable, and is in violation of the inalienable right to the liberty clause of the bill of rights, and both the statute and the Cincinnati ordinance enacted thereunder are unconstitutional. In re Smith, 13 N. P. (N.S.) 278.

FORM OF CHARGE.

That E F, late of said county, on the ——— day of ———, 19—, in said county of ——— and state of Ohio, and from the said ——— day of ———, 19—, until the filing of this indictment, he, the said E F being then and there a male person of the age of twenty-one years and upwards, and being then and there able to perform manual labor, did wilfully and unlawfully not make reasonable effort to procure employment and has failed and refused to labor at reasonable prices.

Sec. 13409-1. Penalty for person falsely representing himself as blind, deaf, dumb, etc.

That it shall be unlawful for any person to falsely represent himself or herself as blind, deaf, dumb, crippled, or otherwise physically defective for the purpose of obtaining money or other thing of value, and any person so falsely representing himself or herself as blind, deaf, dumb, crippled, or otherwise physically defective for the purpose of securing aid or assistance, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not exceeding one hundred dollars, or imprisoned in the county jail or the workhouse of the county for a period not exceeding six months, or both, at the discretion of the court. (106 v. 207, § 1.)

Sec. 13410. Improper use of stenographer's notes on transcript thereof.

Whoever, being employed as a stenographer, furnishes to a person other than his employer, without the consent of such employer, a transcript or copy of all or a portion of any matter taken by him while so employed or reads it to or permits it to be read by a person other than his employer, without such employer's consent, or discloses it, or the purport thereof, to any person other than his employer without such employer's consent, shall be fined not less than twenty-five dollars nor

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more than five hundred dollars or imprisoned not more than six months, or both. This section shall not apply when the person so employed is called as a witness and is directed to testify by a proper court as to matters within his employment. (99 v. 20.)

Sec. 13411. Wearing view-obstructive headgear in theater, etc.

Whoever, being the owner, lessee, proprietor or manager of a theater, hall, opera house, or a building where theatrical or other performances are given, when an admission fee is charged, permits a person attending such performance to wear a hat, bonnet or other covering for the head, which may obstruct the view of another during such performance, shall be fined not less than two dollars nor more than ten dollars. (92 v. 122, § 1; R. S. 6983-1.)

Sec. 13412. Advertising to procure divorce.

Whoever, advertises, prints, publishes, distributes or circulates a circular, pamphlet, card, hand-bill, advertisement, printed paper, book, newspaper or notice, or causes such to be done, with intent to procure or aid in procuring a divorce, either in this state or elsewhere, shall be fined not less than twenty-five dollars nor more than five hundred dollars or imprisoned not more than six months, or both. This section shall not apply to the printing or publishing of a notice or advertisement authorized by law. (R. S. § 7011; 75 v. 45, § 1.)

Sec. 13413. Repealed, 107 v. 182, § 2.

Sec. 13414. Serving mare within thirty feet of a street or alley.

Whoever, being the owner, or his agent, of a stallion or jack, permits it to serve a mare within thirty feet of a public street or alley in a municipal corporation, shall be fined not less than five dollars nor more than twenty-five dollars. (88 v. 394, § 1; R. S. § 7038-1.)

Sec. 13415. Acting as agent, etc., for certain companies in default of taxes.

Whoever, directly or indirectly, acts as agent, or transacts any business on account of or for the benefit of an express, telegraph, telephone or insurance company, against which taxes have been assessed in any county in this state and remain unpaid for twenty days after the time provided by law for the payment thereof, shall be fined not less than one hundred dollars nor more than five hundred dollars or imprisoned in the county jail and fed on bread and water only not more than

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thirty days, or both. The payment of such unpaid tax by an agent or other person, shall not be a violation of this section. (R. S. § 2843; 82 v. 92; 59 v. 91, § 7; S. & S. 770.)

Sec. 13416. Unlawful re-insurance by life insurance company, etc.

Whoever, being an officer, director or stockholder of a company organized under the laws of this state, to do the business of life, accident or health insurance, either on the stock, mutual, stipulated premiums, assessment or fraternal plan, violating or consenting to a violation of any provision of law governing or forbidding the re-insurance of the risks, or any part thereof, or the consolidaton of such company with any other company or association, or the assumption or re-insurance of the whole or any portion of the risks of another company by such company, shall be fined not less than ten thousand dollars and imprisoned in a county or city jail not less than one year. (R. S. § 3597; 94 v. 103; 77 v. 267; 69 v. 150, § 2; S. & S. 218.)

Sec. 13417. Foreign life insurance companies on the assessment plan.

Whoever, being an officer or agent of a corporation, company or association organized under the laws of any other state of the United States to transact the business of life or accident insurance, or life and accident insurance on the assessment plan, fails or neglects to comply with, or violates any provision of law relating to such corporation, company or association, shall be fined not less than one hundred dollars nor more than one thousand dollars or imprisonment not more than six months, or both. (R. S. §§ 3630e, 3630g; 77 v. 181; 80 v. 180; 82 v. 138; 88 v. 252; 97 v. 144.)

Sec. 13418. Violations by accident insurance companies and officers thereof.

Whoever, being a company organized under the laws of this state for the special purpose of insuring against accidental personal injury and loss of life sustained while traveling by railroad, steamboat or other mode of conveyance, against accidental personal injury and loss of life sustained by accident of every description, and against expenses and loss of time occasioned by injury or sickness, and on such terms and conditions, and for such periods of time, and confined to such countries and localities, and to such persons as from time to time, may be provided in the by-laws of such company, or any officer thereof violating any provision of law relating to such company, shall be fined not less than one hundred dollars nor more than one thousand dollars or imprisoned in the county jail where such officer resides, not less than thirty days nor more than one year, or both. (R. S. § 3630i; 84 v. 130; 91 v. 332;

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Sec. 13418-1. Penalties.

Any person, officer, member or examining physician of any society, authorized to do business under this act, who shall knowingly or wilfully make any false or fraudulent statement or representation in or with reference to any application for membership, or for the purpose of obtaining money from or benefit in any society transacting business under this act, shall be guilty of a misdemeanor, and, upon conviction thereof shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, or imprisonment in the county jail for not less than thirty days nor more than one year, or both, in the discretion of the court; and any person who shall wilfully make a false statement of any material fact or thing in a sworn statement as to the death or disability of a certificate holder in any such society for the purpose of procuring payment of a benefit named in the certificate of such holder, and any person who shall wilfully make any false statement in any verified report or declaration under oath required or authorized by this act, shall be guilty of perjury, and shall be proceeded against and punished as provided by the statutes of this state in relation to the crime of perjury.

Any person who shall solicit membership for, or in any manner assist in procuring membership in any fraternal benefit society not licensed to do business in this state, or who shall solicit membership for, or in any manner assist in procuring membership in any such society not authorized as herein provided, to do business as herein defined in this state, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than fifty nor more than two hundred dollars.

Any society, or any officer, agent or employe thereof neglecting or refusing to comply with, or violating any of the provisions of this act, the penalty for which neglect, refusal or violation is not specified in this section, shall be fined not exceeding two hundred dollars upon conviction thereof. (102 v. 547.)

Sec. 13419. Divulging telephonic communication.

Whoever, being connected with a telephone company, incorporated or unincorporated, operating a telephone line, or engaged in the business of transmitting to, from, through or in this state, telephone messages, in any capacity, wilfully divulges a private telephone message, or the nature of such message, or a private conversation between persons communicating over the wires of such company, or wilfully delays the transmission of a telephonic message or communication, with intent to injure, deceive or defraud the sender or receiver thereof or any other person, or any such telephone company, or to benefit himself or any other person,

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shall be fined not less than one hundred dollars nor more than one thousand dollars and imprisoned in the county jail not less than thirty days nor more than three months. (100 v. 10.)

Sec. 13420. Diverting freight.

Whoever, being the agent of a railroad company, knowingly diverts or permits freight under his control to be diverted from the railroad or railroads over which it is ordered to be conveyed by the shipper thereof, shall be fined not more than one hundred dollars or imprisoned in the county jail not more than thirty days, or both. (R. S. § 3370; 58 v. 74, § 3; S. & S. 117.)

Sec. 13421. Obstructing street, alley, etc.

Whoever obstructs or incumbers, by fences, buildings, structures or otherwise, a public ground, highway, street or alley of a municipal corporation, shall be fined not more than five hundred dollars. (R. S. § 6921; 30 v. 22, §§ 1, 2; 54 v. 130, §§ 1, 2; 72 v. 112, § 1; 32 v. 38, § 1; S. & C. 441, 878, 880.)

Obstructing highway, street or alley.—Where an ordinance forbids singing on the "streets or sidewalks," a complaint, charging that the ordinance was violated by singing on a street, is not supported by proof that the act was done on a sidewalk. Trimble v. Village of Bucyrus, 5 W. L. B. 15.

A person owning lands through which a public road passes, who gives his assent to the cutting down of a tree standing thereon within a few feet of the traveled track, is guilty of obstructing the highway, if the tree falls within the road and is suffered to remain therein to the hindrance or inconvenience of travelers. A condition attached to such assent that the tree should not be felled into the road, does not relieve the owner from liability. Nagle v. Brown, 37 O. S. 7.

An unbridged or insufficiently bridged mill race which cuts across a public road is a nuisance, and by § 32 of the act of March 1, 1868 (S. & S. 669), the township trustees were authorized to bring an action to recover the statutory penalty. Burton v. Tuttle, 30 O. S. 62.

Wrongfully laying railroad tracks on a public highway is a nuisance for which the county commissioners may recover damages. Lawrence Ry. v. Commissioners, 35 O. S. 1.

Where a railroad company places its track in a public highway without having acquired the right to do so, an owner of abutting lands having the fee in the highway may compel appropriations. Railroad Co. v. Williams, 35 O. S. 168.

An abutment for an overhead crossing erected by a railway company on a public highway is a nuisance, even though the company is authorized to construct its road across the highway; the statute of limitations is not an available defense to an action brough by the county commissioners under G. C. § 2424. Little Miami Ry. v. Commissioners, 31 O. S. 338.

This section does not punish as a nuisance every excavation in a public highway. Railroad Co. v. Morey, 47 O. S. 207.

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Where a railroad company, authorized to lay tracks in a street, so obstructs the drainage provided for the street that accumulated rain water floods the cellars of abutting owner, it is a nuisance. Zanesville v. Fannan, 53 O. S. 605.

This section makes the obstruction of a street criminal, but does not define an obstruction so as to include an electric sign fourteen feet above the sidewalk. Reese v. Cleveland, 5 N. P. (N.S.) 193, 18 O. D. 12.

Wires strung by virtue of a license are not a nuisance. Newman v. Avondale, 1 O. D. 356, 31 Bull. 123.

The statute of limitations will not run in favor of a railroad company unlawfully laying tracks in the streets of a city. Horstman v. Street Railroad Co., 1 N. P. (N.S.) 25, 13 O. D. 670.

A city council has no power to authorize the erection of any structure, abutment or support in a public way which will necessarily prevent a joint use by the public of the part so occupied. Cincinnati v. Railroad Co., 4 N. P. (N.S.) 217.

The maintenance of a fence or other obstruction in a highway, or in the street or alley of a municipality, is a nuisance punishable as a misdemeanor under this section, and the statute of limitations does not run in its favor. Sullivan v. Columbus, 12 O. D. 651.

Where a sidewalk is obstructed with dirt and stones loosened by the action of rain and frost falling from a wall erected by the city to support a bank caused by a cut in the grade, the owner of such property is not liable under this section. State v. Langdon, 54 Bull. 377, 7 O. L. R. 331.

Private nuisance.—For cases in which obstructions to streets or highways amount to a private nuisance, see Clark v. Fry, 8 O. S. 358; Zanesville v. Fannan, 53 O. S. 605; Cleveland v. Payne, 72 O. S. 347; Reuben v. Swigart, 15 C. C. 565, 7 O. C. D. 642.

Indictment.—In an indictment for obstructing a public highway, under the second section of the act of April 15, 1857 (S. & C. 880), it is sufficient to describe the highway as being situated in a certain township within the county, without naming the point of its commencement or termination, or stating the particular part of the road obstructed. Matthews and Buzzard v. State, 25 O. S. 536.

FORM OF CHARGE.

Obstructing a highway.

On the ——— day of ———, A. D. 19—, and on all the other days since and up to the finding of this indictment, with force and arms, within the limits of ———, a municipal corporation in the county of ———, and State of Ohio, knowingly and unlawfully did obstruct and incumber the public highway, to-wit, a certain street (here give the name of the street) duly, lawfully and regularly laid out and opened and used as a public highway by the people and citizens of the State of Ohio, (here state the means of the obstruction, fences, buildings or other obstructions), then and there knowingly and unlawfully and with intent to obstruct and incumber the said highway, to the common nuisance of the citizens and people of the said county, municipal corporation and State of Ohio.

Sec. 13421-1. Selling diphtheria antitoxin prohibited.

Any person or persons who shall sell any diphtheria antitoxin produced and distributed by the state board of health shall be guilty of a

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misdemeanor and upon conviction shall be fined in any amount not exceeding one hundred dollars. (106 v. 23, § 3.)

Sec. 13421-3. Altering, defacing or destroying guide posts, signs, etc.; penalty.

Whoever unlawfully alters, defaces, injures or destroys any guide-post, sign-post, warning-sign or other sign in, upon, along or near a public highway, so placed under direction of the authorities having charge of such highway, shall be fined not more than fifty dollars, nor less than five dollars. (106 v. 659, § 280.)

Sec. 13421-4. Altering or injuring marker or monument; penalty.

Whoever unlawfully alters, defaces, injures or destroys any marker or monument placed along, upon or near a public highway, by the proper authorities, to mark the boundaries thereof, or for any other purpose, shall be fined not more than fifty dollars, nor less than five dollars. (106 v. 659, § 281.)

Sec. 13421-5. Refusal or neglect of officials to perform duty; penalty.

If any county highway superintendent or township trustee or township highway superintendent, wilfully neglects, fails or refuses to perform the duties of his office, he shall be fined not more than one hundred dollars, nor less than ten dollars, and said conviction shall operate as a removal from office. (106 v. 659, § 282.)

Sec. 13421-6. Destroying or injuring bridge, culvert, etc.; penalty.

Whoever wilfully injures, defaces or destroys any bridge, culvert or watering trough upon or along a public highway, or whoever alters, injures, defaces, destroys or damages any tool, implement, machine or structure provided to shelter the same, belonging to either the state, county or township, for use in, or upon or along a public highway, or used in the construction, maintenance, improvement or repair thereof, shall upon conviction thereof be confined in the penitentiary not less than one year or more than five years, or fined not more than five thousand dollars nor less than five dollars, or both. (106 v. 659, § 283.)

Sec. 13421-7. Obstructing ditch, drain or watercourse; penalty; duty of superintendent.

Whoever wrongfully obstructs any ditch, drain or water course along, upon, or across a public highway, or wrongfully diverts any

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water from adjacent lands to, or upon a public highway, shall be fined not more than one hundred dollars, nor less than five dollars; and whenever the township highway superintendent may learn of any such obstruction or diversion he shall forthwith notify the township trustees, who shall cause written notice thereof to be personally served upon the person, firm or corporation, or upon any agent in charge of the property of the person, firm or corporation so causing such obstruction or diversion; which notice may be served by a constable of the proper township or by any person authorized and deputed therefor, by the township trustees and which shall describe and locate said obstruction or diversion and direct the immediate removal of the same; if said person, company or corporation shall not within five days from the receipt of said written notice proceed to remove said obstruction and complete the removal of the same within a reasonable time, the township highway superintendent, upon the order of the township trustees, shall remove said obstruction. The expense thereby incurred shall be paid in the first instance out of any money levied, collected and available for highway purposes and the amount of such expense shall be collected from said person, company or corporation by civil action by the township trustees, and paid into the highway fund of the township. (106 v. 659, § 284.)

Sec. 13421-8. Failure to make levy or furnish estimates; penalty.

Whoever, being charged with the duty of making any levy or furnishing any estimates or budgets requesting any levy or allowance for the construction, improvement, maintenance or repair of any public highway, bridge or culvert, shall fail to make such levy or allowance, or furnish such estimate, budget or request shall be fined not more than two hundred dollars, nor less than twenty-five dollars. (106 v. 660, § 285.)

Sec. 13421-9. Driving over closed highway; penalty.

Whoever drives over, upon, along or across a public highway, or any part thereof, which has been closed, while in the process of construction, reconstruction or repair by order of the state highway commissioner, county highway superintendent, county commissioners, township trustees or other official or employe having authority to close such highway, shall be fined not more than fifty dollars, nor less than five dollars. (106 v. 660, § 286.)

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Sec. 13421-10. Hindering or obstructing official making an arrest; penalty.

Whoever resists, hinders, obstructs or abuses any sheriff, constable or other official, while attempting to arrest offenders under any of the provisions of this act, or interferes in any way, with any person charged under the provisions of this act with the enforcement of the law relative to public highways, shall be fined not more than fifty dollars, nor less than ten dollars. (106 v. 660, § 287.)

Sec. 13421-11. Placing obstruction in highway; penalty.

Whoever unlawfully places any obstruction in, or upon a public highway, shall be fined not more than fifty dollars, nor less than five dollars. (106 v. 660, § 288.)

Sec. 13421-12. Operating traction engines upon improved highways; terms "traction engine" and "tractor" defined.

Whoever drives over the improved highways of the state, or any political subdivision thereof, a traction engine or tractor with tires or wheels equipped with ice picks, spuds, spikes, chains or other projections of any kind extending beyond the cleats shall be fined for each offense not less than ten dollars nor more than one hundred dollars. The terms "traction engine" or "tractor" as used in this act, shall apply to all self-propelling engines equipped with metal-tired wheels operated or propelled by any form of engine, motor or mechanical power, used for agricultural purposes. No city, county, village or township shall adopt, enforce or maintain any ordinance, rule or regulation contrary to or inconsistent with the terms of this act; or require of any person any license tax upon or registration fee for any traction engine, tractor, or trailer, or any permit or license to operate. Operators of traction engines or tractors shall have the same rights, upon the public streets and highways as the drivers of any other vehicles unless some other safe and convenient way is provided, and no public road open to traffic shall be closed to traction engines or tractors. (106 v. 660, § 289; 107 v. 652.)

Sec. 13421-13. Failure or neglect to drag road; penalty.

Whoever, being charged by law with the duty of causing any unimproved or gravel road or part thereof to be dragged, shall wilfully fail, neglect or refuse to cause the same to be done, in such manner and within the time fixed by the provisions of the sections applicable thereto, or by the proper authority, shall, on conviction thereof, be fined not more than fifty dollars, nor less than ten dollars. (106 v. 660, § 290.)

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Sec. 13421-14. Digging, excavating, piling earth or building fence on highway; penalty.

Whoever digs up, removes, excavates or places any earth or mud upon any portion of any public highway or builds a fence upon the same without legal authority or permission so to do, shall be fined not more than two hundred dollars nor less than ten dollars. Each day that such person continues to dig up, remove or excavate any portion of the public highway shall constitute a separate offense. (106 v. 660, § 291.)

Sec. 13421-15. Failure or neglect to cut weeds, briers, etc.; penalty.

Whoever, being charged by law with the duty of cutting, destroying or removing any weeds, briers or bushes upon or along a public highway, wilfully fails, neglects or refuses to cut, destroy or remove such weeds, briers or bushes within the time fixed by law or on the order of the proper officials, shall be fined not more than fifty dollars, nor less than five dollars. (106 v. 661, § 292.)

Sec. 13421-16. Placing nails, tacks, glass, etc., upon highway; penalty.

Whoever places upon any part of a public highway, lane, road, street or alley, any tacks, bottles, wire, glass, nails or other articles, except such substances as may be placed there by proper authority for the repair or construction thereof, which may damage or injure any person, vehicle or animal traveling along or upon said public highway, shall be fined not more than two hundred dollars or imprisoned not more than six months or both. (106 v. 661, § 293.)

Sec. 13421-17. Violation a misdemeanor; penalty.

Any person violating any of the provisions of sections 7246 to 7249 inclusive of the General Code shall be deemed guilty of a misdemeanor and upon conviction thereof, shall be fined not less than twenty-five dollars nor more than one hundred dollars. (106 v. 661, § 294; 107 v. 141.)

Sec. 13421-18. Possession of tools, etc., belonging to state, county, etc.; penalty.

If any person shall, without being duly authorized, have in his control or possession any equipment, tools, implements, or other property belonging to the state, county or township, such person shall be fined not more than one hundred dollars, nor less than five dollars. (106 v. 661, § 295.)

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Sec. 13421-18a. Use of county vehicle except for official business prohibited; penalty.

Any person using or driving any automobile, motorcycle or other conveyance owned, hired or leased by the county commissioners of any county for the use of any county official or employe, for any purpose other than the transaction of official business shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not less than twenty-five dollars nor more than two hundred dollars and imprisoned not less than ten days nor more than sixty days. (107 v. 141.)

Sec. 13421-19. Failure of manufacturer or dealer to keep record of motor vehicles; penalty.

Every manufacturer of or dealer in motor vehicles and every owner, proprietor, person in control or keeper of any garage, stable, shop or other place of business who fails to keep or cause to be kept any record required by law shall be fined not more than one hundred dollars nor less than ten dollars. (106 v. 661, § 296.)

Sec. 13421-20. Fines credited to maintenance and repair fund.

All fines collected under the provisions of this chapter shall be paid into the county treasury and placed to the credit of the fund for the maintenance and repair of the highways within such county. (106 v. 661, § 297.)

Sec. 13421-21. Courts having jurisdiction.

All courts of competent jurisdiction, including police judges, mayors of villages and cities, shall have jurisdiction as provided by law in all cases of violation of any of the sections contained in this act. (106 v. 661, § 298.)

Sec. 13421-22. Prosecution of offenses.

It shall be the duty of the prosecuting attorney of the county to prosecute all offenders under this chapter upon application of any official or individual filing any affidavit before any magistrate of the county, charging an offense under this chapter. Nothing herein shall prevent the prosecuting attorney or any other official from prosecuting offenders under this chapter upon his own initiative. (106 v. 661, § 299.)

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Title II.—Criminal Procedure.

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CHAPTER I.

JURISDICTION.

SECTION
13422. General jurisdiction of justices of the peace.
13423. Special jurisdiction of justices, police judges and mayors.
13424. Jurisdiction of probate court.
13425. Jurisdiction of the court of common pleas.

Sec. 13422. General jurisdiction of justices of the peace.

A justice of the peace shall be a conservator of the peace and have jurisdiction in criminal cases throughout the county in which he is elected and where he resides, on view or on sworn complaint, to cause a person, charged with the commission of a felony or misdemeanor, to be arrested and brought before himself or another justice of the peace, and, if such person is brought before him, to inquire into the complaint and either discharge or recognize him to be and appear before the proper court at the time named in such recognizance, or otherwise dispose of the complaint as provided by law. He also may hear complaints of the peace and issue search warrants. (R. S. § 610; 66 v. 287, §§ 1, 13, 23, 30; S. & C. 810.)

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A person brought before a justice of the peace, charged with an offense, may, notwithstanding he plead not guilty, waive an examination of witnesses to sustain the charge, and submit to be bound over without such an examination. State v. Ritty, 23 O. S. 562.

Every justice of the peace is a conservator of the peace. State ex rel. v. Hudson, 44 O. S. 141.

Under the provisions of R. S. § 610 (G. C. § 13422) a justice of the peace has "jurisdiction in criminal cases throughout the county in which he is elected and where he resides," and his authority to hear and dispose of a criminal case in the manner prescribed by the statute, is not limited to the township for which he is elected and where he resides. Steele v. Karb, 78 O. S. 376.

Where a bastardy proceeding has been compromised under and in full accordance with G. C. § 12114, and all the provisions of the compromise have been complied with and carried out by the defendant, this constitutes a complete bar to a subsequent proceeding against him under either G. C. § 13008 or § 12970, for failure to support his same illegitimate child. McKelvy v. State, 87 O. S. 1.

As the punishment provided by G. C. § 13008 for failure by a father to support his illegitimate child, may be imprisonment in the penitentiary, this makes such offense a felony, and a justice of the peace therefore has no jurisdiction to try a person accused of violating said section, but is only authorized to conduct a preliminary examination and either discharge the accused or recognize him to appear before the proper court. McKelvy v. State, 87 O. S. 1.

Jurisdiction of the subject-matter is always fixed and determined by law, while jurisdiction of the person may be fixed and determined by consent of parties, failure to timely and properly object, and the like. Rogers v. State, 87 O. S. 308 (reversing 14 C. C. (N.S.) 177, 22 O. C. D. 389).

In civil matters a justice of the peace, having jurisdiction of the subject-matter, may, by consent of all the parties, hear the evidence and the arguments outside of the township in which he resides and for which he was elected. Stark v. Treat et al., 6 C. C. (N.S.) 286.

A criminal trial by a justice of the peace outside of the township in which he resides and was elected is beyond his powers. Ex parte Boswell, 3 N. P. (N.S.) 555, 16 O. D. 250.

Sec. 13423. Special jurisdiction of justices, police judges and mayors. §1153

Justices of the peace, police judges and mayors of cities and villages shall have jurisdiction, within their respective counties, in all cases of violation of any law relating to: §4414

1. Adulteration or deception in the sale of dairy products and other food, drink, drugs and medicines. 4416 4417

2. The prevention of cruelty to animals and children. 12519

3. The abandonment, non-support or ill treatment of a child by its parent. 12520

4. The abandonment or ill treatment of a child under sixteen years of age by its guardian.

5. The employment of a child under fourteen years of age in public exhibitions or vocations injurious to health, life or morals, or

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which cause or permit it to suffer unnecessary physical or mental pain.

6. The regulation, restriction or prohibition of the employment of minors.

7. The torturing, unlawfully punishing, ill treating, or depriving anyone of necessary food, clothing or shelter.

8. The selling, giving away or furnishing of intoxicating liquors as a beverage, or keeping a place where such liquor is sold, given away or furnished, in violation of any law prohibiting such acts within the limits of a township and without the limits of a municipal corporation.

9. The shipping, selling, using, permitting the use of, branding or having unlawful quantities of illuminating oil for or in a mine.

10. The sale, shipment or adulteration of commercial feed stuffs.

11. The use of dust creating machinery in workshops and factories.

12. The conducting of a pharmacy, or retail drug or chemical store, or the dispensing or selling of drugs, chemicals, poisons or pharmaceutical preparations therein.

13. The failure to place and keep in a sanitary condition a bakery, confectionery, creamery, dairy, dairy barn, milk depot, laboratory, hotel, restaurant, eating house, packing house, slaughter house, ice cream factory, or place where a food product is manufactured, packed, stored, deposited, collected, prepared, produced or sold for any purpose.

14. Offenses for violation of laws in relation to inspection of steam boilers, and of laws licensing steam engineers and boiler operators.

15. The prevention of short weighing and measuring and all violations of the weights and measures laws. (R. S. §§ 306a, 3718a; 97 v. 397, § 9; 99 v. 32, § 3; 99 v. 507, §§ 77, 78; 100 v. 15, § 4; 100 v. 64, § 6; 91 v. 161; 81 v. 181; 85 v. 144; 90 v. 335; 91 v. 412; 94 v. 92; 95 v. 517; 103 v. 539.)

The only provision for trial of persons accused of violating § 4405, governing the sale of drugs and poisons, is found in this statute. Sickles v. State, 7 N. P. (N.S.) 338, 19 O. D. 117.

As the punishment provided by G. C. § 13008, for failure by a father to support his illegitimate child may be imprisonment in the penitentiary, this makes such offense a felony, and a justice of the peace therefore has no jurisdiction to try a person accused of violating said section, but is only authorized to conduct a preliminary examination and either discharge the accused or recognize him to appear before the proper court. McKelvy v. State, 87 O. S. 1.

Section 41 (G. C. § 1558-41) of the act establishing a municipal court in the city of Cincinnati, limiting the jurisdiction of a justice of the peace in any township of Hamilton county other than Cincinnati township in criminal matters, was

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not repealed by the act passed April 28, 1913 (103 O. L. 539), amending G. C. § 13423. In re Hesse, 93 O. S. 230.

A judgment of the court of common pleas reversing a judgment of the justice of the peace should be affirmed on error, if such judgment was reversed properly upon any ground; and although such judgment was wrong as to the sufficiency of the affidavit filed before the justice of the peace, it should be sustained if one of the questions presented was the weight of the evidence. State v. Martin, 87 O. S. 459 (affirming without opinion, 11 N. P. (N.S.) 183, 21 O. D. 520).

Under the provisions of G. C. § 13422 a justice of the peace has "jurisdiction in criminal cases throughout the county in which he is elected and where he resides," and his authority to hear and dispose of a criminal case in the manner prescribed by the statute, is not limited to the township for which he is elected and where he resides. Steele v. Karb, 78 O. S. 376.

In a prosecution under this section, upon a plea of not guilty, before the justice can acquire jurisdiction to hear the complaint and render final judgment in the case without the intervention of a jury, the accused must waive his right to a jury trial. Such waiver must clearly and affirmatively appear upon the record, and it can not be assumed or implied by a reviewing court from the silence of the accused, or his mere failure to demand a jury (Dailey v. State, 4 O. S. 57, and Billigheimer v. State, 32 O. S. 435, distinguished). Simmons v. State, 75 O. S. 346.

In a prosecution for selling adulterated milk, unless the affidavit charges the particular sale to be a second or subsequent offense, imprisonment can not be imposed as part of the punishment, and a justice of the peace with whom the affidavit is filed, has jurisdiction to try the case without a jury. Inwood v. State, 42 O. S. 186 approved and followed, State v. Smith, 69 O. S. 196.

Mandamus will lie to compel the exercise of such jurisdiction. In re Turner, 5 Ohio, 542; State, ex rel., v. McCarty, Judge, 52 Ohio St. 363 (approved and followed, State v. Smith, 69 O. S. 196).

The jurisdiction of a police judge or mayor of a city or village is confined to offenses committed within his city or village in cases of violation of the laws to prevent the adulteration of food and drink, the adulteration and deception in the sale of dairy products, drugs and medicines, and in violation of the law for prevention of cruelty to animals, or in any prosecution under this section. State v. Peters, 67 O. S. 494.

The introduction of coloring matter into oleomargarine is the adulteration of an article of food punishable by law, and of such offense a justice of the peace has jurisdiction. State v. Ruedy, 57 O. S. 224.

In cases in which a justice of the peace has jurisdiction his proceedings are to be viewed indulgently. Nickels v. State, 22 C. C. (N.S.) 236.

The statutes of this state punishing cruelty to animals violate none of the constitutional provisions and are a proper exercise of the police power of the state. Beamer v. State, 21 C. C. 440, 12 O. C. D. 4.

In civil matters a justice of the peace, having jurisdiction of the subject-matter may, by consent of all the parties, hear the evidence and the arguments outside of the township in which he resides and for which he was elected. Stark v. Treat et al., 6 C. C. (N.S.) 286.

It is not necessary that the accused should waive a trial by jury in writing, to give the magistrate jurisdiction to proceed to final judgment in the case without a jury: Martindale v. State, 2 C. C. 2, 1 O. C. D. 328.

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This section and G. C. § 13511 are not in pari materia. Martindale v. State, 2 C. C. 2, 1 O. C. D. 328.

The court has no right to consider the prior history of legislation, and the effect of a rearrangement or transposition of statutes by the codifying commission if the statute itself is plain and unambiguous, even though from a consideration of its history the court may be sure that the legislature did not intend to enact what it in fact enacted. State v. Pohlman, 13 N. P. (N.S.) 254, 57 Bull. 411.

In a case which involves a violation of a statute or of an ordinance, the penalty for which is only a fine, a jury is not an inalienable right of the accused, and it accordingly may be refused if the statute so provides. Ames v. State, 11 N. P. (N.S.) 385, 22 O. D. 92, 56 Bull. 165.

A criminal trial by a justice of the peace outside of the township in which he resides and was elected is beyond his powers. Ex parte Boswell, 3 N. P. (N.S.) 555, 16 O. D. 250.

Selling morphine in a patent medicine without a "poison" label pasted on the bottle is not an "adulteration or deception" so as to confer jurisdiction upon a justice of the peace. State v. Marvin, 5 N. P. 209, 5 O. D. 593, 7 O. D. 204.

Sec. 13424. Jurisdiction of probate court.

The probate court shall have concurrent jurisdiction with the court of common pleas in all misdemeanors and all proceedings to prevent crime. (R. S. § 6454; 76 v. 22, § 1; S. & C. 1221; S. & S. 629-632; 77 v. 32; 80 v. 48; 81 v. 25; 81 v. 88; 82 v. 168; 83 v. 135; 84 v. 227; 85 v. 4; 85 v. 94; 85 v. 227; 86 v. 117; 87 v. 274; 90 v. 101; 91 v. 68; 98 v. 49.)

The jurisdiction conferred on the probate courts by the act of May 4, 1859 (2 S. & C. 1223), did not embrace the power to entertain a complaint in a peace-warrant proceeding commenced before a justice of the peace. The jurisdiction conferred by that act related only to crimes and misdemeanors. State v. Brazier, 37 O. S. 78.

In prosecutions begun in the probate courts, under G. C. §§ 13195 and 13225, information must be filed by the prosecuting attorney in accordance with G. C. § 13441 before the probate court has jurisdiction to try such prosecutions. Rogers v. State, 87 O. S. 308 (reversing 14 C. C. (N.S.) 177, 22 O. C. D. 389).

Jurisdiction of the subject-matter is always fixed and determined by law, while jurisdiction of the person may be fixed and determined by consent of parties, failure to timely and properly object, and the like. Rogers v. State, 87 O. S. 308.

A prosecution under the act of May 1, 1854, providing "against the evils resulting from the sale of intoxicating liquors" must be commenced before a justice of the peace or mayor, and not in the probate court. Miller v. State, 3 O. S. 475.

Revised Statutes § 6454 (G. C. § 13424), giving the probate court in certain counties concurrent jurisdiction with the common pleas in all misdemeanors and proceedings to prevent crime, is not unconstitutional for lack of uniform operation.

Inasmuch as the rank of courts and the right of appeal is a matter regulated by statute, the fact of the concurrent jurisdiction of the probate and common pleas courts in certain matters does not require that an appeal from the probate

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court in any one of those matters should be to the circuit court instead of the common pleas court. Oberer v. State, 8 C. C. (N.S.) 93, 18 O. C. D. 620.

General Code §§ 13454 to 13457, inclusive, do not authorize the prosecuting attorney to transfer to the probate court a prosecution filed in the common pleas. Smith v. State, 12 C. C. 458, 4 O. C. D. 35.

Sec. 13425. Jurisdiction of the court of common pleas.

The court of common pleas shall have original jurisdiction of all crimes and offenses, except in cases of minor offenses, the exclusive jurisdiction of which is vested in justices of the peace or in other courts inferior to the common pleas. In all criminal cases where a person is indicted and tried in the court of common pleas for an offense properly cognizable therein and found guilty of a minor offense embraced within the terms of the indictment, the jury shall so return in their verdict and the court shall thereupon proceed to pass the sentence prescribed by law in such case. (R. S. § 456; 52 v. 73, § 5; S. & C. 386, 397.)

Where it appears upon the hearing of a petition for writ of habeas corpus that an affidavit has been filed and indictment returned in a court having jurisdiction charging the petitioner with an offense against the law of this state, the court upon such hearing will not inquire into the guilt or innocence of the accused, but if it appear that the court issuing the capias or order of arrest has jurisdiction of the offense charged it will remand him to the custody of the officer of that court. In re Poage, 87 O. S. 72.

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CHAPTER II.

JUSTICES OF THE PEACE.

SECTION
13426. Bills of exceptions in summary convictions.
13427. Justice's fees for such bills.
13428. Special constables in certain townships.
13429. Justice must pay fines into county treasury.
13430. In default of such payment suit shall be brought.
13431. Annual statement of fines rendered to auditor.

Sec. 13426. Bills of exceptions in summary convictions.

In all cases of summary conviction before a justice of the peace of an offense punishable by fine or imprisonment, the defendant shall have the right to except and to have a bill, containing the exceptions, signed by such justice and made part of the record. Such convictions may be reviewed by the common pleas court on proceedings in error and reversed or affirmed. (R. S. § 614; 84 v. 44; 47 v. 38, § 2; S. & C. 821.)

A bill of exceptions taken in a trial before a justice of the peace in a criminal case is not required to be entered upon his docket. It is sufficient if it be allowed and signed by the justice and filed with the papers in the case, and an entry of these facts with the date thereof is made on his docket. State v. Ransick, 62 O. S. 283.

Sec. 13427. Justice's fees for such bills.

For signing a bill of exceptions, a justice of the peace shall be allowed ten cents, and for copying and certifying the transcript of the proceedings and a bill of exceptions, ten cents for each hundred words, to be taxed in the cost bill and collected as other costs. (R. S. § 615; 84 v. 44; 47 v. 38, § 3; S. & C. 822.)

Under the act of May 15, 1886 (83 O. L. 168), a justice of the peace in a city of the second grade of the first class may maintain a civil action to collect the fees provided in this section, such fees when collected by him being payable into the state treasury. Hart v. Murray, 48 O. S. 605.

Sec. 13428. Special constables in certain townships.

When the constables in a township situated on and consisting in whole or in part of one or more islands in a lake in this state, or in a township adjoining or abutting on lands belonging to a state or national home for disabled volunteer soldiers or a disabled volunteer soldiers' home, are insufficient to maintain the peace and enforce the laws for the preservation of order therein, a justice of the peace of such township may appoint not more than ten special constables to be conservators of the peace within such township and with like powers as are conferred by law upon constables in criminal causes. He shall enter such appoint-

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ments upon his docket and they shall continue in force for one year unless revoked by him. Such special constables shall receive like fees as are paid for similar services to regular constables. (R. S. § 616; 90 v. 128; 65 v. 162, § 1; S. & S. 429.)

Sec. 13429. Justice must pay fines into county treasury.

Fines collected by a justice of the peace shall be paid into the general fund of the county where the offense was committed within thirty days after collection unless otherwise provided by law. (R. S. § 617; 35 v. 87, § 28; S. & C. 814, 451.)

Sec. 13430. In default of such payment suit shall be brought.

If a justice fails to so pay such fines, the treasurer of the county shall bring suit, in the name of the state, for the recovery thereof and interest thereon, and the court in rendering judgment therefor shall add a penalty of ten per cent. on the amount found to be due such general fund. (R. S. § 618; 35 v. 87, § 29; S. & C. 815.)

Sec. 13431. Annual statement of fines rendered to auditor.

Every justice of the peace, on or before the first day of February in each year, shall make and deliver to the auditor of the county in which he resides, a statement in writing of all fines assessed by him, for the year ending on the first day of January next preceding. Such statement shall contain the name of the party, the amount of the fine, the costs thereon, the time when assessed, whether execution has been issued and the return thereon, or, if no execution has been issued, the reason for not issuing it. If such fine has been collected, such justice shall exhibit to such auditor the receipt of the proper officer for the payment thereof, and if no fine has been assessed he shall return that fact. The statement must be certified by the justice to be a true and correct transcript from his docket, and he shall make like statements as to all causes in which fines were imposed prior to such year, if all or part thereof have been collected within such year. (R. S. § 619; 40 v. 53, § 2; S. & C. 820.)

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CHAPTER III.

JUSTICES, POLICE JUDGES AND MAYORS.

SECTION
13432. When imprisonment is a part of the punishment a jury shall be impaneled.
13433. Clerk's duties.
13434. Jurors.
13435. Second or subsequent offense.
13436. Jurisdiction and power of constables, etc.
13437. New trial.
13438. Fees of jurors and witnesses.
13439. Costs.
13440. Humane society may employ an attorney.

Sec. 13432. When imprisonment is a part of the punishment a jury shall be impaneled.

In prosecutions before a justice, police judge or mayor, when imprisonment is a part of the punishment, if a trial by jury is not waived, the magistrate, not less than three days nor more than five days before the time fixed for trial, shall certify to the clerk of the court of common pleas of the county that such prosecution is pending before him. (R. S. § 3718a; 81 v. 181; 85 v. 144; 90 v. 335; 91 v. 412; 94 v. 92; 95 v. 517.)

The waiver of a jury under this section must clearly and affirmatively appear upon the record, and it can not be assumed or implied by a reviewing court from the silence of the accused, or his mere failure to demand a jury (Dailey v. State, 4 O. S. 57, and Billigheimer v. State, 32 O. S. 435, distinguished). Simmons v. State, 75 O. S. 346.

General Code § 13432 does not confer jurisdiction upon justices of the peace, police judges or mayors, but directs the method of procedure for obtaining a jury in cases in which such magistrates have final jurisdiction. State, ex rel., v. Renz, 26 C. C. (N.S.) 391, 5 O. A. R. 421.

It is not necessary that the defendant should waive in writing his right to a trial by jury. Martindale v. State, 2 C. C. 2, 1 O. C. D. 328.

Under former statutes it was held that if the prosecution was before a justice the case was entitled to a trial by jury, if not waived, whether the punishment was a fine only or included imprisonment, but if the prosecution was before a police judge or mayor and the punishment was a fine only, the accused was not entitled to a jury trial. Peters v. State, 8 N. P. 595, 11 O. D. 555 (affirmed, 67 O. S. 494).

In a case which involves a violation of a statute or of an ordinance, the penalty for which is only a fine, a jury is not an inalienable right of the accused, and it accordingly may be refused if the statute so provides. Ames v. State, 11 N. P. (N.S.) 385, 22 O. D. 92, 56 Bull. 165.

This section gives final jurisdiction to justices of the peace in cases in which imprisonment is a part of the punishment and a jury is not waived, and where it is attempted to carry such a case to the probate court a motion to discharge the accused will lie. State v. Pohlman, 13 N. P. (N.S.) 254, 57 Bull. 411.

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Mandamus will not lie against the clerk of the court of common pleas to compel him to draw from the jury wheel names of persons to serve as jurors in a prosecution before a justice of the peace for the violation of G. C. § 12475. State, ex rel., v. Renz, 5 O. A. R. 421, 26 C. C. (N.S.) 391.

Sec. 13433. Clerk's duties.

Thereupon the clerk, in the presence of representatives of both parties, shall draw from the jury wheel or box containing the names of persons selected to serve as petit jurors in the court of common pleas in such county, twenty names which shall be drawn and counted in a like manner as for jurors in the court of common pleas. The clerk shall forthwith certify the names so drawn to the magistrate, who, thereupon, shall issue to any constable, chief of police or marshal in the county, a venire containing the names of the persons to serve as jurors in the case and make due return thereof. (R. S. § 3718a; 81 v. 181; 85 v. 144; 90 v. 335; 91 v. 412; 94 v. 92; 95 v. 517.)

Sec. 13434. Jurors.

The jurors shall be subject to like challenges as jurors in criminal cases, except capital cases, in the court of common pleas. If the venire is exhausted without obtaining the number required to fill the panel, the magistrate shall fill the panel with talesmen in the manner provided for criminal cases in the court of common pleas. (R. S. § 3718a; 81 v. 181; 85 v. 144; 90 v. 335; 91 v. 412; 94 v. 92; 95 v. 517.)

Sec. 13435. Second or subsequent offense.

In such prosecutions, where a different punishment is provided for a second or subsequent offense, the information or affidavit upon which the prosection is based, must charge that it is the second or subsequent offense or the punishment shall be as for the first offense. (R. S. § 3718a; 81 v. 181; 85 v. 144; 90 v. 335; 91 v. 412; 94 v. 92; 95 v. 517.)

General Code § 13376 providing for the punishment of one found guilty of cruelty to animals, as therein specified, is constitutional. Gibbs v. State, 18 C. C. (N.S.) 480.

This section does not amount to a delegation of legislative or judicial power to the prosecuting witness, although he may charge the accused with committing a first offense and thereby subject him in many cases to a less severe punishment; and in some cases where the first offense is punishable by fine only, and the second offense by fine or imprisonment, he may deprive the accused of a jury trial under G. C. §§ 13432 to 13434 by charging him with a first offense. Gibbs v. State, 18 C. C. (N.S.) 480.

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Sec. 13436. Jurisdiction and power of constables, etc.

In pursuing or arresting a defendant and in subpoenaing the witnesses in such prosecutions, the constable, chief of police, marshal or other court officer shall have like jurisdiction and power as the sheriff in criminal cases in the common pleas court, and he shall receive like fees therefor. (R. S. § 3718a; 81 v. 181; 85 v. 144; 90 v. 335; 91 v. 412; 94 v. 92; 95 v. 517.)

The limitation fixed in section 3019, General Code, of $100 per year for services rendered by a constable, does not apply to services rendered by him under sections 13436 and 13439, General Code, in prosecutions for neglecting minor children. State, ex rel., v. Cooper, 7 O. A. R. 218.

Sec. 13437. New trial.

In such prosecutions, if there is a verdict for conviction, a new trial may be granted for like reasons and subject to like conditions as a new trial in criminal cases in the court of common pleas. (R. S. § 3718a; 81 v. 181; 85 v. 144; 90 v. 335; 91 v. 412; 94 v. 92; 95 v. 517.)

Sec. 13438. Fees of jurors and witnesses.

In such prosecutions, the jurors and the witnesses shall be entitled to like mileage and fees as in criminal cases in the court of common pleas. (R. S. § 3718a; 81 v. 181; 85 v. 144; 90 v. 335; 91 v. 412; 94 v. 92; 95 v. 517.)

Sec. 13439. Costs.

In such prosecutions, no costs shall be required to be advanced or secured by a person authorized by law to prosecute. If the defendant be acquitted or discharged from custody by nolle or otherwise, or convicted and committed in default of paying fine and costs, all costs of such case shall be certified under oath by the trial magistrate to the county auditor, who, after correcting errors therein, shall issue a warrant on the county treasury in favor of the person to whom such costs and fees are payable. All moneys which are to be paid by the county treasurer as provided in this chapter shall be paid out of the general revenue fund of such county. (R. S. § 3718a; 81 v. 181; 85 v. 144; 90 v. 335; 91 v. 412; 94 v. 92; 95 v. 517.)

There is no authority for the payment of fees out of the county treasury to a humane officer for services rendered by him in cases prosecuted before a justice of the peace by the humane society under the laws of the state. State, ex rel., v. Kleinhoffer, 92 O. S. 163.

The limitation fixed in section 3019, General Code, of $100 per year for services rendered by a constable, does not apply to services rendered by him under sections 13436 and 13439, General Code, in prosecutions for neglecting minor children. State, e xrel., v. Cooper, 7 O. A. R. 218.

Sec. 13440. Humane society may employ an attorney.

A humane society or its agent may employ an attorney to prosecute the following cases, under this section, who shall be paid for his serv-

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ices out of the county treasury in such sum as the judge of the court of common pleas or the probate judge of such county or the county commissioners thereof may approve as just and reasonable:

1. Violations of law relating to the prevention of cruelty to animals or children;

2. Violations of law relating to the abandonment, non-support or ill-treatment of a child by its parent;

3. Violations of law relating to the employment of a child under fourteen years of age in public exhibitions or vocations injurious to health, life or morals or which cause or permit such child to suffer unnecessary physical or mental pain;

4. Violations of law relating to neglect or refusal of adult to support destitute parent. (R. S. § 3718a; 81 v. 181; 85 v. 144; 90 v. 335; 91 v. 412; 94 v. 92; 95 v. 517.)

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CHAPTER IV.

PROBATE COURT.

SECTION
13441. Prosecution to be by information.
13442. Information shall not be quashed for error in original examination.
13443. Prosecution may begin in probate court.
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13450. If defendant refuse to plead.
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13458. Effect of recognizance.
13459. When accused may be tried.
13460. How fines collected.
13461. Security for costs, and judgment thereon.
13462. When provisions for common pleas to govern in probate court.

Sec. 13441. Prosecution to be by information.

An indictment is not required in cases in which the probate court has criminal jurisdiction. The prosecuting attorney shall forthwith file an information in such court setting forth briefly, in plain and ordinary language the charges against the accused, and he shall be tried thereon. (R. S. § 6455; 55 v. 176, § 2; 55 v. 186, § 4; S. & C. 1220, 1221.)

Under the code of criminal procedure, the accused may demur to an information when the facts stated therein do not constitute an offense punishable by the laws of this state. Davis v. State, 32 O. S. 24.

It is not necessary that an information should be indorsed with the name of the prosecuting witness. Bartlett v. State, 28 O. S. 669.

One charged with the commission of a misdemeanor was prosecuted by information, and the information being unsupported by oath or affirmation, the accused moved to quash it for that cause, which motion was overruled. Held, that in overruling such motion there was error. Eichenlaub v. State, 36 O. S. 140.

No jurisdiction is conferred upon the probate court to determine a complaint in a peace warrant proceeding commenced before a justice of the peace. The jurisdiction conferred upon the probate court by the act of May 4, 1859 (2 S. & C. 1223), relates only to crimes and misdemeanors, and conduct justifying the issuance of a peace warrant, is neither. State v. Brazier, 37 O. S. 78.

A prosecution under the act of May 1, 1854, providing "against the evils resulting from the sale of intoxicating liquors" must be commenced before a justice of the peace or mayor, and not in the probate court. Miller v. State, 3 O. S. 475.

One can not be placed on trial for a crime unless the charge thereto is supported by oath or affirmation, and the mere unverified information of the prosecutor is not sufficient. Smith v. State, 12 C. C. 458. 4 O. C. D. 35.

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It is not necessary that the information required under R. S. § 6455, in prosecutions before the probate court shall be sworn to and the preliminary affidavit is sufficient to carry the matter through all the courts. Oberer v. State, 8 C. C. (N.S.) 93, 18 O. C. D. 620.

In prosecutions begun in the probate court, under favor of G. C. §§ 13195 and 13225 information must be filed by the prosecuting attorney in accordance with G. C. § 13441 before the probate court has jurisdiction to try such prosecutions. Rogers v. State, 87 O. S. 308 (reversing 22 O. C. D. 389).

FORM OF CHARGE.

Form for the commencement of an information.

The State of Ohio, ——— County, ss.

——— court, ——— term, in the year of our Lord one thousand nine hundred and ———.

J W, prosecuting attorney, of the State of Ohio, for the said county of ———, now here, in said ——— court, in and for said county, in the name and by the authority, and on behalf of the State of Ohio, information gives that E F, on the ——— day of ———, in the year of our Lord one thousand nine hundred and ———, in the county of ———, aforesaid.

Form for conclusion of an information.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

J W, Pros. Atty., ——— Co.

Sec. 13442. Information shall not be quashed for error in original examination.

The probate court shall not quash an information filed by the prosecuting attorney because of a defect or error in the papers or proceedings of a justice of the peace or mayor before whom the original examination was held. An information shall not be filed by the prosecuting attorney for an offense not specified in the transcript from the docket of such justice or mayor. (R. S. § 6456; 53 v. 137, § 1; S. & C. 1219.)

Sec. 13443. Prosecution may begin in probate court.

The prosecuting attorney of a county may file an information in the probate court without a preliminary hearing before an examining court, upon the proper affidavits being filed therein and the probate court shall issue a warrant for the arrest of the defendant named therein. (R. S. § 6457; 53 v. 137, § 2; S. & C. 1219.)

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One charged with the commission of a misdemeanor was prosecuted by information, and the information being unsupported by oath or affirmation, the accused moved to quash it for that cause, which motion was overruled. Held, that in overruling such motion there was error. Eichenlaub v. State, 36 O. S. 140.

Under Art. I, § 14, of the constitution, no person can be placed on trial for a crime against the law of this state upon the mere information of a public prosecutor, nor until he has been charged with the commission of such crime upon oath or affirmation. An indictment being founded upon oath or affirmation, of course, satisfies the requirement of the constitution. Smith v. State, 12 C. C. 458, 4 O. C. D. 35.

Prosecuting attorney in certain counties may prosecute in the probate court, but this does not authorize a transfer of the case from common pleas to probate court. Smith v. State, 12 C. C. 458, 4 O. C. D. 35.

The filing of an affidavit is a necessary prerequisite to the presentation of an information, but no allegation of the filing of such affidavit is necessary in the information itself. If it is claimed that no affidavit has been filed, a motion to quash will lie. Weisbrodt v. State, 50 O. S. 192.

The accused may demur to an information where the facts stated therein do not constitute an offense punishable by the laws of this state. Davis v. State, 32 O. S. 24.

An information must substantially conform to the affidavit, but where the affidavit charges selling "intoxicating liquors" in a brothel, while the information charges selling "intoxicating liquors, to-wit, beer," in a brothel, it is not substantially variance. Schmeltz v. State, 8 C. C. 82, 4 O. C. D. 287.

It is not necessary that the information authorized by this section shall be sworn to where there is a preliminary affidavit, and the latter is sufficient to carry the charge through all the courts. Oberer v. State, 8 C. C. (N.S.) 93, 18 O. C. D. 620.

Sec. 13444. Recognizance.

When arrested the defendant shall be taken before the probate court, and, if not discharged, shall be recognized to appear at the next term thereof, or, if in default of bail, shall be committed to the jail of the proper county. (R. S. § 6457; 53 v. 137, § 2; S. & C. 1219.)

Sec. 13445. Amendments.

An information may be amended at any time before or during trial on such terms as the probate court may direct, and when the amendment is material, the defendant may elect to continue the cause. (R. S. § 6458; 55 v. 176, § 3; 55 v. 186, § 4; S. & C. 1220, 1221.)

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Sec. 13446. Charges to be distinctly read.

When the defendant is brought before the probate court, and after a reasonable time to examine the charge preferred against him, such charge shall be distinctly read to him and he shall be required to plead thereto. (R. S. § 6459; 83 v. 26; 55 v. 176, § 4; S. & C. 1220.)

Sec. 13447. Pleas.

The defendant may plead: 1. Guilty; 2. Not guilty; 3. A former judgment of conviction or acquittal of the offense charged, which may be pleaded either with or without the plea of not guilty. (R. S. § 6460; 55 v. 176, § 5; S. & C. 1220.)

Sec. 13448. Pleas, how entered and withdrawn.

Each plea shall be oral and entered on the minutes of the court in substantially the following form: If the defendant pleads guilty, he pleads guilty of the offense charged against him; if he pleads not guilty, he pleads not guilty of the offense charged against him; if he pleads a former conviction or acquittal, he pleads that he has been convicted or acquitted, of the offense charged against him, by the judgment of the court ——— (naming it) at ——— (naming the place) the ——— day of ———. The probate court, at any time before judgment, upon a plea of guilty, may permit it to be withdrawn and a plea of not guilty substituted. (R. S. § 6461; 55 v. 176, §§ 6, 7; S. & C. 1220.)

Sec. 13449. What plea of not guilty includes.

A plea of not guilty shall be a denial of every material allegation in the information, and all matters of defense tending to establish a defense may be given in evidence under the plea of not guilty. (R. S. § 6462; 55 v. 176, § 8; S. & C. 1220.)

Sec. 13450. If defendant refuse to plead.

If the defendant refuse to plead to the information, a plea of not guilty shall be entered. (R. S. § 6463; 55 v. 176, § 9; 55 v. 186, § 9; S. & C. 1220, 1222.)

Sec. 13451. Judge to try if jury not demanded.

Upon a plea, other than that of guilty, if the defendant does not demand trial by jury, the probate court shall try the issue. (R. S. § 6464; 55 v. 176, § 10; 55 v. 186, § 9; S. & C. 1220, 1222.)

Under G. C. § 13432 authorizing certain proceeding if "trial by jury is not waived," the waiver must clearly appear upon the record and not be presumed (Dailey v. State, 4 O. S. 57, and Billigheimer v. State, 32 O. S. 435, distinguished). Simmons v. State, 75 O. S. 346.

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The probate court, before the act of April 26, 1854, had no power to impanel a jury of twelve in a criminal case. The constitution does not execute itself and no power can be derived from common law. Sovereign v. State, 4 O. S. 489.

A record showing that the accused did not demand a jury sufficiently shows a waiver of the trial by jury. Dailey v. State, 4 O. S. 57.

This section is not unconstitutional. Dailey v. State, 4 O. S. 57.

The constitutional right of trial by jury is not infringed when the option is given to the accused to have the issue tried by the court or by the jury and he submits the cause to the court. Dillingham v. State, 5 O. S. 280.

Unless the record shows that the defendant demanded a jury, he will be deemed to have waived it. Billigheimer v. State, 32 O. S. 435.

Sec. 13452. When jury may be demanded, and trial by.

Before the probate court shall receive any testimony upon the trial, the defendant may demand a trial by jury, and thereupon such jury shall be subject to like challenges as jurors in like cases in the court of common pleas. (R. S. § 6465; 55 v. 176, § 11; S. & C. 1220.)

Sec. 13453. How jury drawn and summoned.

The jury for the trial of criminal cases in the probate court shall be drawn as for the court of common pleas, before or during a term of the probate court, as such court may order, and a venire for such jury to attend either forthwith, or on a day named, shall be issued by the probate court. Such venire shall be served and returned in a like manner as a venire from the court of common pleas. (R. S. § 6466; 72 v. 9, § 13; 75 v. 961, § 13.)

The probate court, before the act of April 26, 1854, had no power to impanel a jury of twelve in a criminal case. The constitution does not execute itself and no power can be derived from common law. Sovereign v. State, 4 O. S. 489.

Sec. 13454. How recognizances taken.

Recognizances taken by a justice of the peace or other officer authorized to take them and transcripts of criminal cases within the jurisdiction of the probate court, as defined by law, may be returned to the probate court or the court of common pleas. (R. S. § 6467; 55 v. 176, § 12; 76 v. 110, § 14; S. & C. 1220, 1221; S. & S. 632.)

Sec. 13455. How returned.

Such recognizances and transcripts shall be returned to either of such courts forthwith after the commitment of the accused or after the taking of a recognizance for his appearance before either of such courts; and in whichever of such courts they may be returned to, or the accused, by such recognizance, may be required to appear in, the prosecuting attorney, at his election, may proceed with the prosecution, and the

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accused, shall appear therein and answer to his recognizance. (R. S. § 6467; 55 v. 176, § 12; 76 v. 110, § 14; S. & C. 1220, 1221; S. & S. 632.)

This section does not authorize the prosecuting attorney to transfer a prosecution from the common pleas court to the probate court. Smith v. State, 12 C. C. 458, 4 O. C. D. 35.

Sec. 13456. How certified.

The probate judge or clerk of the court of common pleas, on demand of the prosecuting attorney, shall certify the recognizance and all other papers in the case returned to his court by such justice or other officer, to the court in which the proescuting attorney elects to proceed. (R. S. § 6467; 55 v. 176, § 12; 76 v. 110, § 14; S. & C. 1220, 1221; S. & S. 632.)

This section does not authorize the prosecuting attorney to transfer to the probate court a prosecution filed in the common pleas court. Smith v. State, 12 C. C. 458; 40 C. D. 35.

The general rule established by the original act, conferring jurisdiction on the probate court in certain criminal cases, was, that prosecutions should originate before some officer who could hear testimony, and decide upon its sufficiency, to put the accused on his defense before the probate court. Gates v. State, 3 O. S. 293.

The return of the transcript and recognizance by the justice of the peace, and other officers authorized to take the same, to the probate judge of the county, was necessary to give that officer jurisdiction of offenses; and the record of his court, to be sufficient to sustain a conviction and judgment before him, had to contain a transcript of proceedings before such justice or other officer in order to show that he properly acquired jurisdiction of the offense. Gates v. State, 3 O. S. 293; Miller v. State, 3 O. S. 475; Aultfather v. State, 4 O. S. 467; Robinson v. State, 6 O. S. 141.

The jurisdiction being conferred, the information took the place of an indictment, and, within the limits in which an indictment might vary the charge and still subject the accused to the consequences of a default on his recognizance taken by a magistrate, the information might vary or depart from the charge set forth in the transcript or recognizance. Gates v. State, 3 O. S. 293. But proceedings before a probate judge under the provisions of this chapter, before jurisdiction can be acquired, are no longer predicated upon this rule.

Sec. 13457. Monthly terms.

In the exercise of criminal jurisdiction, the probate court shall be considered as holding monthly terms, commencing on the first Monday of each month. The commissioners of the county by an order entered on their journal, and published for three consecutive weeks in a newspaper printed within the county, may fix such term at longer intervals, and, in like manner, change the order. (R. S. § 6468; 55 v. 176, § 13; S. & C. 1220.)

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Sec. 13458. Effect of recognizance.

If a justice of the peace or other officer, authorized to examine and hold a person for bail, recognize such person to appear forthwith before the probate court, or in default of bail commit him, and the court has adjourned before the recognizance has been entered into or commitment made, or before the recognizance or commitment and a transcript of the proceedings have been filed therein, the recognizance or commitment shall not thereby become void, but the defendant shall answer at the next term of the court. (R. S. § 6469; 55 v. 176, § 14; S. & C. 1220.)

Sec. 13459. When accused may be tried.

If a justice of the peace or other officer recognizes or commits a person to appear in the probate court at the next term thereof, the court being in session at the time the recognizance is entered into or commitment made and a transcript filed, the recognizance or commitment shall not thereby become void, but the defendant appearing in the court, with the consent of the prosecuting attorney, may be tried at the then present term. (R. S. § 6469; 55 v. 176, § 14; S. & C. 1220.)

Sec. 13460. How fines collected.

Fines imposed by the probate court in criminal cases, and the costs thereof, including the fees of the judge thereof, shall be collected in like manner as fines and costs are collected by the court of common pleas in criminal cases. (R. S. § 6470; 55 v. 176, § 15; S. & C. 1221; 102 v. 283.)

In matters of lunacy inquests he can recover only the fees provided by G. C. § 1981, and not those provided by G. C. § 1603.

Where a boy or girl is committed to the industrial school for a crime, the probate judge is not entitled to fees, but where they are committed under the compulsory educational law, or in cases where no prosecution and conviction is required, the compensation of the probate judge is the same as that fixed for clerks of the court of common pleas in like cases. Millard v. Commissioners, 5 C. C. (N.S.) 145, 16 O. C. D. 445.

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Sec. 13461. Security for costs and judgment thereon.

A prosecuting attorney, in criminal cases prosecuted in the probate court, may require the prosecuting witness to give security for costs, and, in cases where the defendant is acquitted, such court shall render judgment against such prosecuting witness and his bond unless the court shall be of the opinion that there were reasonable cause for instituting such prosecution. (R. S. § 6471; 86 v. 172; 55 v. 176, § 16; S. & C. 1221.)

To authorize a judgment for costs against a prosecuting witness, the person accused must have been acquitted either by the probate judge, or by a jury of twelve men. Sovereign v. State, 4 O. S. 489.

Sec. 13462. When provisions for common pleas to govern in probate court.

The provisions governing criminal proceedings in the court of common pleas, so far as applicable, shall govern like proceedings in the probate court. (R. S. § 6472; 75 v. 963, § 19.)

Cited: Smith v. State, 12 C. C. 458, 465.

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CHAPTER V.

PROCEEDINGS TO PREVENT OR DETECT CRIME.

PEACE WARRANT.

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PEACE WARRANT.

~~Sec. 13463.~~ Complaint to keep the peace.

When complaint is made in writing, upon oath, before a justice of the peace, mayor or police judge, that complainant has just cause to fear, and fears that another will commit an offense against the person or property of himself, his ward or child, such magistrate shall issue a warrant, in the name of the state, to the sheriff or to any constable of the county, or, if issued by an officer of a municipal corporation, to the marshal or other police officer of such corporation, commanding him forthwith to arrest and take the person complained of before such magistrate, or another magistrate of such county, to answer such complaint. (R. S. § 7106; 66 v. 287, § 1; 36 v. 18, § 1; S. & C. 1402.)

Object of a complaint to keep the peace.—The object of a peace proceeding is to obtain security against the commission of a crime from one whose conduct is such as to afford a reasonable ground to believe that he contemplates an offense against the person or property of another. Such conduct, however, is not a crime or misdemeanor. State v. Brazier, 37 O. S. 78.

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Probate court—Jurisdiction.—The jurisdiction conferred on probate court by the act of May 4, 1859 (2 S. & C. 1223), did not embrace the power to entertain a complaint in a peace warrant proceeding commenced before a justice of the peace. The jurisdiction conferred by that act related only to crimes and misdemeanors. State v. Brazier, 37 O. S. 78.

A peace bond can not be required in a prosecution under a city ordinance. Pope v. Cincinnati, 3 C. C. 497, 2 O. C. D. 285.

FORM OF AFFIDAVIT.

Before a justice of the peace, to obtain a peace warrant to be issued.

The State of Ohio, ——— County, ss.

Before me, one of the justices of the peace for said county, personally came C D, who, being duly sworn according to law, deposes and says that he has just cause to fear, and does fear, that E F will (here state the threatened injury or violence, according to the fact).

Sworn to and subscribed before me, at the county aforesaid, this ——— day of ———, A. D. 19—. A B, Justice of the Peace.

FORM OF AFFIDAVIT.

Before a mayor or police judge, to obtain a peace warrant to be issued.

The State of Ohio, ——— County, ss.

Before me, the mayor of the village of ———, in said county (or, the mayor, or, police judge, as the case may be, of the city of ———, in said county). (Here follow the last form, given above, to the signature of the officer at the close, which will be of the proper form, thus:)—A B, mayor of the village of ———, (or, mayor, or, police judge of the city of ———).

Sec. 13464. Form of warrant to keep the peace.

A warrant substantially in the form following shall be sufficient:

The State of Ohio, ——— County, ss.

To any Constable of said County, Greeting:

Whereas, complaint has been made before me by one C D, on oath, that he has just cause to fear, and does fear, that one E F, will (here state the threatened injury or violence according to the fact as sworn to).

These are therefore to command you to apprehend the said E F, and bring him forthwith before me, or some other magistrate having cognizance of the matter, in said county, to show cause why he should not find surety to keep the peace and be of good behavior toward the citizens of the state generally, and the said C D especially, and for his appearance before the proper court.

Given under my hand, this ——— day of ———.

A B, Justice of the Peace.

(R. S. § 7107; 35 v. 87, § 33; S. & C. 817.)

The State of Ohio, ——— County, ss.

To any Constable of said County, Greeting:

Whereas, complaint has been made before me by one C D, on oath, that he has just cause to fear, and does fear, that one E F will (here state the threatened injury, or violence, according to the facts as sworn to).

These are therefore to command you to apprehend the said E F, and bring him forthwith before me, or some other magistrate having cognizance of the matter,

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in said county, to show cause why he should not find surety to keep the peace and be of good behavior toward the citizens of the state generally, and the said C D especially, and for his appearance before the proper court.

Given under my hand, this ——— day of ———, 19—.

A B, Justice of the Peace.

Form of return upon a peace warrant.

I took the body of the within named E F, and have him before the justice (or, mayor, or, police judge) within named, this ——— day of ———, A. D. 19—.

J W, Constable.

FEES.

Service ..... ———

Mileage ..... ———

(Or, if taken before some other magistrate, say:)

By virtue of this warrant, I arrested the within named E F, and have his body now before A B, a justice of the peace (or other magistrate), this ——— day of ———, A. D. 19—. J W, Constable.

FEES.

Service ..... ———

Mileage ..... ———

Subpoena.

The form of subpœna for witnesses in such cases may be the same as in other criminal cases before justices. See § 13495.

Sec. 13465. Arraignment of accused.

When the accused is brought before the magistrate he shall be heard in his defense. If it is necessary for just cause to adjourn the hearing, the magistrate may order such adjournment, and direct the officer having custody of the accused to detain him in the county jail or other secure and convenient place until such cause of delay is removed, unless a recognizance in such sum as may be fixed by the magistrate, not to exceed five hundred dollars, with sufficient surety, is given by the accused, but such delay shall not exceed two days. (R. S. § 7108; 66 v. 288, § 4; 107 v. 402.)

When the accused waives trial, and offers to enter into recognizance with security for his appearance at court the magistrate may take the same. But even in such case he should hear such statements of the accused, and such sworn testimony of the complainant and other persons, as to satisfy him of the facts and circumstances, with a view to fixing the proper amount of the recognizance. In such case, as in all others, the recognizance and docket entry should both show that an examination was held.

The judgment for costs against the complainant, in cases where the accused is discharged, should include all the costs properly and legitimately made in the prosecution, whether accruing for things done at the instance of the complainant or accused.

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Sec. 13466. Hearing; discharge or recognizance to keep the peace.

The magistrate, upon the appearance of the parties, shall hear the witnesses on oath, and either discharge the accused and render judgment against the complainant for costs and award execution therefor, or order the accused to enter into a recognizance of not less than fifty, nor more than five hundred dollars, with sufficient security, to keep the peace and be of good behavior, for such time as may be just, and render judgment against him for costs and award execution therefor. (R. S. § 7109; 71 v. 70, § 2; 66 v. 288, § 5; 107 v. 402.)

A bond given on a complaint, for sureties of the peace, held good as a common law bond. Troy v. State, W. 135.

A recognizance void, when, in the condition, the time or place of appearance is uncertain or ambiguous. State v. Johnson, 13 O. 176.

The jurisdiction conferred on the probate court of Clermont county by the act of May 4, 1859 (2 S. & C. 1223), did not embrace the power to entertain a complaint in a peace warrant proceeding commenced before a justice of the peace. The jurisdiction conferred by that act related only to crimes and misdemeanors. State v. Brazier, 37 O. S. 78.

In fixing the amount the magistrate should have regard to the heinousness of the offense or crime that it is feared will be committed, the degree, danger, or probability that it will be committed if no bail is required, and the ability of the accused to give bail. In short, the magistrate should require bail in such amount within the limitations of the statute as will, without doubt, preserve the peace and protect the rights of the party complaining.

For form of recognizance of the defendant for his appearance at court, see § 13472.

Sec. 13467. Commitment in default of recognizance.

In default of a recognizance, as specified in the next preceding section, the magistrate shall commit the accused to the jail of the county there to remain until such order is complied with or he is discharged by law. (R. S. § 7110; 66 v. 288, § 3; 107 v. 402.)

For form of commitment after examination upon a complaint to keep the peace, see § 13563. The form of return upon this mittimus will be the same as upon the mittimus in other cases.

Sec. 13468. Appeal to court of common pleas; bond; transcript.

The accused may appeal from the decision of the magistrate to the court of common pleas of the county, by filing with the magistrate within ten days after the decision is rendered an appeal bond in a sum to be fixed by the magistrate at not less than fifty nor more than five hundred dollars, with surety to be approved by such magistrate

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conditioned for the appearance of the accused before the court of common pleas on the first day of the next term thereof, and in the meantime to keep the peace and be of good behavior generally and especially towards the person named in the complaint. Upon the filing of such appeal bond, the magistrate shall forthwith make a certified transcript of his proceedings, the bond included, which upon the payment by appellant of the legal fee therefor, the magistrate shall immediately file, together with all the original papers, in the office of the clerk of said court of common pleas. (R. S. § 7111; 66 v. 288, § 6; 71 v. 70, § 1; 107 v. 402.)

Form of docket entry at the commencement of a prosecution to keep the peace.

The State of Ohio
v. Upon complaint of C D to keep the peace.
E F.

January 8, 19—. This day personally came C D and made complaint in writing, upon oath, that he has just cause to fear, and does fear, that E F will (etc., giving the substance of the complaint).

(And here will follow other entries concerning the issue of the warrant, the subpoenas for witnesses, etc., the same as in other criminal cases.)

Form of docket entry when defendant is required to enter into recognizance for appearance at court.

January 9, 19—. The said E F having been this day brought before me to answer said complaint, was heard in defense thereto, M N, R F, and F W, being sworn and examined as witnesses at the request of the complainant, and S P and O Y at the request of the defendant; whereupon, full examination having been made by me into said complaint according to law,† I am of opinion that there is just cause for said complaint; and the said E F is ordered by me to enter into a recognizance, with good and sufficient security, in the sum of ——— dollars, for his appearance before the court of common pleas of the county, on the first day of the next term thereof (or, if the probate court has jurisdiction of the matter or offense, on the first day of the next term of the probate court for the trial of criminal cases; or, if such court is at the time in session, forthwith); and in the meantime that he shall keep the peace and be of good behavior generally, and especially toward the said C D, which recognizance * the said E F entered into accordingly, with O P and X Y securities; (or, the defendant fails to furnish good and sufficient security, then from the * proceed thus:) which security the said E F failed to enter into as required, but made default of the same, whereupon I issued a warrant for the commitment of the said E F to the jail of the county, according to law, and delivered said warrant to J W, constable (or other officer).

Form of docket entry when defendant is discharged.

(Follow the first form to the †, and then proceed thus:)

I am satisfied that there is no just cause for said complaint, and the said E F is discharged from further answer to the same, and permitted to go hence without day; and it is adjudged and considered by me that the State of Ohio recover of the said C D, complainant, the costs of this prosecution, taxed at ——— dollars and ——— cents. And, thereupon, on the same day, I issued execution against the goods and chattels of the said C D for said costs, and delivered the same to J W, constable.

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Form of execution against the complainant for costs.

The State of Ohio, ——— County, ss.

To any constable of said county, greeting:

Whereas, in a certain prosecution lately pending before me, one of the justices of the peace in and for said county (or other magistrate), to require security to keep the peace, wherein C D was complainant, and E F was defendant, on the ——— day of ———, A. D. 19—, a judgment was lawfully rendered by me, in the name of the State of Ohio, against the said C D, for the costs of said prosecution, taxed at ——— dollars ——— cents; which costs remain due and unpaid to the amount of ——— dollars and ——— cents. You are, therefore, commanded that of the goods and chattels of the said C D you cause to be made the costs aforesaid, so due, and the further costs that have or may accrue; and of this writ make legal service and due return.

Given under my hand and seal, this ——— day of ———, A. D. 19—.

A. B. [SEAL.]

Sec. 13469. Discharge on failure to prosecute.

No further pleadings shall be required, but if the complainant fails to prosecute, the accused shall be discharged unless good cause to the contrary be shown, and the court shall render judgment against such complainant for the costs of prosecution and award execution therefor. (R. S. § 7112; 66 v. 288, §§ 9, 10; 107 v. 402.)

Sec. 13470. Hearing; judgment.

The court shall appoint a time for hearing, and at such time, or the time to which such hearing may be continued, shall hear the witnesses on oath, and either discharge the accused and render judgment against the complainant for costs and award execution therefor, or order the accused to enter into security, for such time as may be just, to keep the peace and be of good behavior, and render judgment against him for costs, and award execution therefor. (R. S. § 7113; 66 v. 289, §§ 7–11; 107 v. 403.)

Where, in a prosecution to keep the peace, the defendant is adjudged to pay the costs, but proves insolvent, the payment of such costs can not be made from the county treasury. Raber v. Auditor of Wayne Co., 12 O. S. 429.

Sec. 13471. Commitment to jail; discharge by court, when.

For want of security, the court shall commit the accused to jail there to remain until such order is complied with or he is discharged by law, and render judgment against him for costs and award execution therefor. He shall not be so imprisoned in any case longer than

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one year and after such commitment or after commitment by a magistrate and no appeal is taken therefrom, the court may at any time discharge him on his own recognizance. (R. S. § 7114; 66 v. 288, §§ 8, 9; 107 v. 403.)

Entry—Discharge from recognizance.

(Title.) Charge of ———.

Now comes the prosecuting attorney, on behalf of the State of Ohio, and also come C D, the complainant, and E F, the defendant, in accordance with the condition of the recognizance entered into by said defendant, before A B, a justice of the peace (or, mayor of ———, or, police judge of ———), and filed in the office of the clerk of this court. And, thereupon, upon full consideration of the evidence,† it is ordered that said defendant be discharged from his said recognizance.

It is further ordered that the costs of this prosecution be paid by the complainant, C D; and execution is awarded therefor.

Entry—Order for other recognizance.

(Title.) Charge of ———.

(As in last to †, and continue:)—it is ordered and adjudged that the said E F do forthwith enter into recognizance in the sum of ——— dollars, with good and sufficient security, to be of good behavior and to keep the peace with all persons, and particularly with the said C D, for the term of one year next hereafter; and, in default of such security, that he be committed to the jail of this county, there to remain until he shall comply with this order, or be otherwise legally discharged; and that he pay the costs of this prosecution, for which execution is awarded.

(If the recognizance is at once given, add:)

And the said defendant, with J H as his surety, enters into recognizance, as above required.

Entry—Discharge on failure of prosecution.

(Title.) Charge of ———.

The defendant now coming, in accordance with the condition of his recognizance, entered into before A B, a justice of the peace (or, mayor of ———, or, police judge of ———), and filed with the clerk of this court, and the said complainant failing to appear to prosecute his said complaint, the said E F is hereby discharged from his said recognizance.

It is further ordered that the costs of this proceeding be paid by the said C D; and execution is awarded therefor.

Sec. 13472. When disturbers of the peace may be committed without process.

Whoever, in the presence of a justice of the peace, mayor or police judge, makes an affray, or threatens to beat or kill another or commit an offense against the person or property of another, or contends with angry words to the disturbance of the peace, may be ordered without process or other proof, to give security as provided in section thirteen

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thousand four hundred and sixty-six, and in default thereof, may be committed as provided in section thirteen thousand four hundred and sixty-seven. (R. S. § 7115; 66 v. 289, § 12; 77 v. 42, 46.)

Form of recognizance taken for threats toward another in presence of a magistrate.

State of Ohio, ——— County, ss.

Be it remembered that on the ——— day of ———, in the year A. D. 19—, E F and M N personally appeared before me, A B, one of the justices of the peace in and for the county aforesaid (or, mayor, of, etc.), and jointly and severally acknowledge themselves to owe the State of Ohio the sum of ——— dollars, to be levied of their goods and chattels, lands and tenements, if default be made in the condition following, to-wit:

The condition of this recognizance is such that, whereas, the said E F, this day, in my presence, in the county aforesaid, did unlawfully threaten to beat and kill one C D, of said county. Now, if the said E F shall personally be and appear before the court of common pleas, on the first day of the term thereof (or, if the probate court has jurisdiction of the matter of defense, on the first day of the next term of the probate court for the trial of criminal cases; or, if such court is at the time in session, forthwith), then and there to answer the charge of said unlawful threat, and abide the order of the court thereon, and in the meantime to keep the peace and be of good behavior generally, and especially toward the said C D, then this recognizance to be void, otherwise to be and remain in full force and virtue in law.

Taken and acknowledged before me, on the day and year first above written.

A B, Justice of the Peace,
(or, Mayor, etc.)

Form of recognizance taken for threats against the property of another, in the presence of a magistrate.

(Follow the last form throughout, except, in stating the threat, say:)

Did unlawfully threaten to commit a certain offense against the property, to-wit, the dwelling-house (or, other property, stating it) of one C D, to-wit, to unlawfully, willfully, and maliciously burn and destroy said dwelling-house (or, other injury, stating it).

Form of recognizance taken for hot and angry words toward another in the presence of a magistrate.

(Follow the form given above for threats, etc., except, in stating the wrongful act, say:)

Did unlawfully and publicly contend against one C D with hot and angry words, to the disturbance of the peace.

Form of recognizance taken for an affray in the presence of a magistrate.

(Follow the last form that is given, in full, for threatening, except, in stating the wrongful act, say:)

Did unlawfully make an affray and agreed to and willfully did fight and box at fisticuffs, with and against C D, to the disturbance of the public peace.

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Form of mittimus to keep the peace and appear in court, issued by a magistrate for acts done or words spoken in his presence.

The State of Ohio, ——— County, ss.

To the keeper of the jail of the County aforesaid, Greeting:

Whereas, E F, this day, in the county aforesaid, and in the presence of me, a justice of the peace in and for said county (or, mayor of, etc.), did unlawfully threaten to beat and wound (or other threat or contention with hot and angry words, or affray, as set forth in one of the foregoing forms of recognizance in like cases) one C D, and has been required by me to give bail in the sum of ——— dollars for his appearance before the court of common pleas (or, before the probate court on the first day of the next term thereof for the trial of criminal cases, or, forthwith, as the fact was), which requisition he has failed to comply with. Therefore, in the name of the State of Ohio, I command you to receive the said E F into your custody, in the jail of the county aforesaid, there to remain until he be discharged by due course of law.

Given under my hand and seal, this ——— day of ———, 19—.

A B, Justice of the Peace,
(or, Mayor of, etc.)

Form of return upon a mittimus to keep the peace.

January 9, 19—. I committed the within-named E F to the custody of the within-mentioned jailer, with whom I left a certified copy of this writ.

J W, Constable.

FEES.

Mileage ..... ———
Service ..... ———

Form of docket entry where security for the peace is required on personal knowledge of the magistrate without trial.

The State of Ohio
v.
A B.
} Requirement of security for the peace.

8, 19—. This day, before me and in my presence, in said county, E F, of said county, did unlawfully (here set out the threat made; or, say, contend with hot and angry words with and against one C D, then and there being), to the disturbance of the peace, a part of said hot and angry words being, among others, the following: (giving some of the words spoken, or, say, make an affray and willfully did agree to and publicly did fight and box at fisticuffs with one C D, then and there being), to the disturbance of the peace. And it appearing to me, from my personal observation and knowledge, that the said E F is guilty of the said acts (or, of making said threats; or, of speaking, among others, the said hot and angry words), to the disturbance of the peace, I caused the said E F to be arrested, and required him to enter into a recognizance in the sum of ——— dollars, with good and sufficient security, conditioned for his appearance before the court of common pleas of said county on the first day of the next term (or, if the probate court has jurisdiction of the matter or offense, on the first day of the next term of the probate court for the trial of criminal cases; or, if such court is at the time in session, forthwith), which requirement the said E F complied with, M N, being his security on said recognizance (or, say, which requirement the

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said E F failed to comply with, but made default of such recognizance and security, whereupon I issued a mittimus for the commitment of said E F to the jail of the county, according to law, and delivered the same to J W, constable.

(Here note the return of the mittimus, and give, in the proper place, the items of cost as in other cases.)

(If the arrest is for an affray, and both parties are arrested, the entry upon the docket may be as and for a joint prosecution against both, and the charge upon the docket will then be stated thus:)

This day, before me and in my presence, in said county, E F and C D did unlawfully make an affray, and did agree to and publicly and willfully did fight and box at fisticuffs, to the disturbance of the public peace. (In such case, however, a separate recognition should be taken for each party.)

Sec. 13473. When convicts required to enter into recognizance.

A person convicted of a misdemeanor may be required by the court to enter into a recognizance, with sufficient surety, in such sum as the court deems proper, to keep the peace and be of good behavior for such time, not exceeding two years, as the court directs. The court may order such person to stand committed until such order is complied with or he is discharged by law; but the court may discharge such person at any time on his own recognizance. (R. S. § 7116; 29 v. 144, § 57; S. & C. 435.)

Journal entry in a court where defendant, convicted of a misdemeanor, is required to enter into recognizance to keep the peace.

(After journal entry of judgment, add:) and it is further ordered by the court that the said E F enter into a recognizance, with sufficient surety, in the sum of ——— dollars, to keep the peace and be of good behavior for ——— (not exceeding two years), and that the said E F stand committed to the jail of the county (or, to the workhouse of the city of) of ———, until said order requiring him, the said E F, to give said recognizance is complied with, or he be otherwise discharged by due course of law.

PRIZE-FIGHTS, DOG-FIGHTS, ETC.

Sec. 13474. Sheriff and other officers shall arrest persons intending to engage in prize-fight.

When a sheriff, constable, marshal or other police officer has reason to believe that a person in his jurisdiction is about to engage as principal or second in a premeditated fight or contention, commonly called a prize-fight, or is in training or preparation to engage as principal therein, he shall forthwith arrest such person and take him before a judge of the court of common pleas, justice of the peace, mayor or police judge and give notice to the prosecuting attorney, who shall forthwith attend before such officer, and, upon the proper affidavit being filed, prosecute the complaint. (R. S. § 7117; 65 v. 29, § 3; S. & S. 274.)

Sec. 13475. Hearing.

Such officer, as provided in the next preceding section, shall hear the witnesses on oath and if he finds the complaint true, order the ac-

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cused to enter into a recognizance, with sufficient sureties, in a sum not less than five hundred dollars nor more than ten thousand dollars, that he will not engage in such a fight or contention within one year thereafter in this state or elsewhere. In default of such recognizance, the officer shall commit the accused to jail there to remain until the order is complied with. (R. S. § 7117; 65 v. 29, § 3; S. & S. 274.)

Order for recognizance that defendant will not engage in prize fight.

(Title.) This day came the prosecuting attorney on behalf of the State of Ohio, and the defendant, E F, being brought before the Hon. ———, one of the judges of the court of common pleas for ——— county, Ohio, by the sheriff charged with being about to engage as principal (or, second, as the case may be) in a premeditated fight or contention commonly called a prize-fight (or, is in training or preparation to engage as principal therein, as the case may be).

Thereupon this cause came on to be heard upon the affidavit of M N and the testimony and the court finding the complaint to be true it is ordered by the said court that the said E F shall forthwith enter into recognizance in the sum of ——— dollars with good and sufficient security conditioned that he will not engage in any such fight or contention within one year in this state or elsewhere, and that in default of such recognizance that the said E F be committed to the jail of this county there to remain until he shall comply with such order or be legally discharged.

(If the security is given at once add) And thereupon came the said defendant with A B as his surety and entered into the recognizance as required above which recognizance is approved by the court.

Sec. 13476. How prisoner discharged.

After the expiration of one month of confinement, if the accused is unable to give the recognizance named in the next preceding section, a judge of the court of common pleas or probate judge may discharge him upon his own recognizance in a like amount and with like conditions, upon proof of his own affidavit and other evidence, that he will never engage in such a fight or contention. (R. S. § 7117; 65 v. 29, § 3; S. & S. 274.)

Sec. 13477. Sheriff may suppress prize-fight, and arrest offenders.

When a sheriff has reason to believe that a fight or contention, as is described in section thirteen thousand four hundred and seventy-four, is about to take place in his county, he shall forthwith summon sufficient citizens of the county, suppress such fight or contention and arrest all persons found thereat violating the law and take them before a judge of the court of common pleas or a magistrate, to be dealt with as provided by law. (R. S. § 7119; 65 v. 29, § 5; S. & S. 275.)

Sec. 13478. Sheriff and other officers shall arrest persons intending to engage in dog-fighting, etc.

When a sheriff, constable, marshal, police officer, or agent of a duly incorporated society for the prevention of cruelty to animals has reason to believe that a person within his jurisdiction is about to violate the law as to dog-fighting, cock-fighting, bear-baiting, pitting one animal against another, or similar cruelty to animals, he shall forthwith arrest such person and take him before a justice of the peace, mayor or police judge. (R. S. § 3719a; 81 v. 181, 182.)

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Sec. 13479. Hearing.

Upon the proper affidavit being filed, such judge or magistrate shall hear the witnesses on oath, and, if he finds the complaint true, order the accused to enter into a recognizance, with sufficient sureties, in a sum not less than one hundred dollars nor more than five hundred dollars, that he will not violate such law within one year thereafter. In default of such recognizance, such officer shall commit the accused to jail until such order is complied with or he is discharged by law, or until he shall make and subscribe an oath, in the presence of two witnesses, that he will not violate the law or aid or abet in so doing, within such year. (R. S. § 3719a; 81 v. 181, 182.)

This section and the following section confer jurisdiction upon justices of the peace to proceed with the trial of one accused of cruelty to animals on the filing of a proper affidavit and without the filing of an information. Muhlhauser v. State, 1 C. C. (N.S.) 273, 15 O. C. D. 81.

Sec. 13480. Subsequent offense.

Upon conviction of a person for a subsequent violation of section thirteen thousand four hundred and seventy-eight, within one year, he shall be fined not less than twenty-five dollars nor more than five hundred dollars or imprisoned not less than thirty days nor more than ninety days, or both. (R. S. § 3719a; 81 v. 181, 182.)

Sec. 13481. Recognizances under foregoing sections.

A recognizance taken under this subdivision of this chapter shall be certified by the judge or magistrate taking it to the court of common pleas of the county where it shall be recorded. The prosecuting attorney, when he has reason to believe that the condition thereof has been broken, shall forthwith bring suit thereon and pay the amount so collected into the treasury of the county. (R. S. § 7118; 81 v. 184; 65 v. 30, § 4; S. & S. 274.)

FORMS AND PROCEDURE CONCERNING PRIZE-FIGHTING.

Form of affidavit to prevent a prize-fight.

The State of Ohio, ——— County, ss.

Before me, A B, personally came C D, who, being duly sworn according to law, deposes and says that E F is about to engage as principal (or, second) in a premeditated fight or contention, commonly called a prize-fight (or, that E F is in training and preparation to engage as principal in a premeditated fight or contention, commonly called a prize-fight).

A B, Justice of the Peace,
(or, Mayor of, etc.)

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Form of docket entry, in a proceeding to prevent prize-fighting, before a justice or mayor.

The State of Ohio
v. } Prosecution to prevent prize-fighting.
E F.

On this ——— day of ———, 19—, personally came before me, O P, sheriff of said county (or, constable of the township of ———, etc., or, marshal of, etc.), having at the same time before me in his custody the body of E F, arrested, as is alleged, under authority given by § 13474 of the General Code of the State of Ohio. And thereupon came B W, prosecuting attorney of this county, and at his instance an affidavit was made in due form before me by O P (the officer making the arrest, or other person, as the case may be), that E F (etc., copying the accusation contained in the affidavit). And, thereupon, I inquired into the truth of the said charge, R A, E L, and W T, being sworn and examined by me as witnesses on behalf of the state, and S R on behalf of the defendant, and thereupon I find the said charge to be true, and the said E F is required by me to enter into a recognizance with sufficient sureties resident of the state, to be approved by me as required by the said § 13474, in the sum of two thousand dollars (or other sum not less than five hundred nor more than ten thousand dollars). And it is adjudged and considered by me that the State of Ohio, plaintiff, recover of the said E F, defendant, the sum of ——— dollars and ——— cents, the costs and expenses of this prosecution. And, thereupon, the said E F, defendant, entered into recognizance with M N and S T, his sureties as above required (or, say, and the said E F, having failed to enter into recognizance with such sureties as required, and being in default, therefor, the said E F is ordered by me to be committed to the jail of the county, there to remain until he gives such recognizance with such sureties; and a mittimus is issued by me for such commitment, and delivered to O P, constable).

Recognizance to prevent prize-fighting.

The State of Ohio, ——— County, ss.

Be it remembered that on the ——— day of ———, in the year of our Lord one thousand nine hundred and ———, E F, M N, and S T, personally appeared before me, A B, one of the justices of the peace in and for said county (or, mayor, etc., as the case may be), and jointly and severally acknowledge themselves to owe the State of Ohio the sum of ——— dollars, to be levied of their goods and chattels, lands and tenements, if default be made in the condition following, to-wit: The condition of this recognizance is such that if the above bound E F shall not engage in any fight or contention, commonly called a prize-fight, within the period of one year from and after the ——— day of ———, 19—, the same being the date of the arrest of the said E F in this cause, in the State of Ohio or elsewhere, then this recognizance shall be void, otherwise it shall be and remain in full force.

Taken, and acknowledged before me, on the day and year first above written.

A B, Justice of the Peace,
(or, Mayor of ———).

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SEARCH WARRANTS.

Sec. 13482. When search warrant may be issued.

A justice of the peace, mayor or police judge may issue warrants to search a house or place:

1. For property stolen, taken by robbers, embezzled, or obtained under false pretense;

2. For forged or counterfeit coins, stamps, imprints, labels, trade marks, bank bills or other instruments of writing, and dies, plates, stamps or brands for making them;

3. For books, pamphlets, ballads or printed papers, containing obscene language, prints, pictures or descriptions manifestly tending to corrupt the morals of youth, and for obscene, lewd, indecent or lascivious drawings, lithographs, engravings, pictures, daguerreotypes, photographs, stereoscopic pictures, models or casts, and for instruments or articles of indecent or immoral use, or instruments, articles or medicines for procuring abortions, or for the prevention of conception, or for self-pollution;

4. For a gaming table, establishment, device, or apparatus kept or exhibited for unlawful gaming, or to win or gain money or other property, and for money or property won by unlawful gaming. (R. S. § 7120; 66 v. 289, § 13; 56 v. 86, § 4; 73 v. 159, § 3; S. & C. 455.)

It will not justify searching a man's house that one has been arrested there, having in his possession counterfeit paper. Simpson v. McCaffrey, 13 O. 509.

Existence on the premises of guilty implements, or evidences of crime, will warrant a search, but if not found there, the justification fails. *Ib.*

See Eichenlaub v. State, 36 O. S. 140.

This section authorizes a magistrate to issue a search warrant for gambling devices and where evidence shows that certain slot machines are gambling devices, the action of the magistrate in ordering them destroyed is lawful. Engelhard v. Kumming, 10 N. P. (N.S.) 609.

Sec. 13483. Affidavit for search warrant.

A warrant for search shall not be issued until there is filed with the magistrate an affidavit particularly describing the house or place to be searched, the person to be seized, and the things to be searched for, and alleging substantially the offense in relation thereto, and that affiant believes, and has good cause to believe, that such things are there concealed. (R. S. § 7121; 66 v. 289, § 14.)

As to search warrant to enforce local option laws, see § 6174, *et seq.*

Form of complaint for search-warrant for stolen property.

The State of Ohio, ——— county, ss.

Before me, the undersigned, justice of the peace within and for said county, personally appeared C D, who, being duly sworn according to law, deposes and says that, on or about the ——— day of ———, A. D. 19—, in the county afore-

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said, the following described personal property, to-wit: (describe the property, as in a charge of larceny), the personal property of said C D, were by some person or persons unlawfully taken, stolen, and carried away from the premises of said C D, of said county; and that said affiant believes, and has good cause to believe, that said personal property, or some part thereof, is concealed (describing the premises where the property is concealed), of ———, in ——— township, of said county; and, further, that there is urgent necessity that said last-mentioned premises be searched in the night-time, to prevent said personal property from being concealed or removed so as not to be found.[1] Said affiant further says that E F did unlawfully steal, take, and carry away said personal property as aforesaid.[2]

Said affiant further says that, on or about the said day, ——— did unlawfully and fraudulently conceal said personal property, or some part thereof, in said county, then and there well knowing the same to have been unlawfully stolen as aforesaid.[3]

———, Affiant.

Sworn to and subscribed before me, this ——— day of ———, 19—.

———, Justice of the Peace.

Form of return upon a search warrant issued for property stolen, embezzled, obtained by false pretenses, or won by gaming, when the personal property, or part thereof, is found.

January 21, 19—, I searched for the personal property described in the within warrant, at the place therein mentioned, and found the following (here describe the goods found, or if all the goods are found, then say: and found all said personal property). I have the said E F last mentioned and the body of the within named E F (or, say, the within named E F can not be found). J W, Constable.

Fees. }

The same in case of an unconditional order of arrest where the accused is found and taken, but not the property.

January 21, 19—, I searched for the personal property described in the within warrant, at the place therein mentioned. No part of said personal property was found. I have the body of the within named E F. J W, Constable.

Fees. }

The same when the goods are not found, and there is no order for arrest, except upon personal property being found.

January 21, 19—, I made search, as required by the within warrant. None of said personal property can be found. J W, Constable.

Fees. }

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[1] If a search warrant during the night-time be not urgently necessary, then erase this paragraph, and also the corresponding one in the warrant.

[2] If the thief be unknown, then erase this paragraph, and also the corresponding one in the warrant.

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[3] Unless some known person, other than the thief, has received the property, as here charged, erase this paragraph, and also the corresponding one in the warrant. (The warrant may order the arrest of all the parties accused in the above affidavit.)

Form and directions for complaint for search-warrant for gaming table, apparatus, or device.

(Set out a charge and complaint for keeping a gaming table, apparatus, or device, under §§ 13054 to 13056 of the General Code, and before the conclusion of the complaint add the following:)

And the affiant aforesaid says that he believes, and has good cause to believe, that the (name of the apparatus, table, or device, etc.), is still now kept by the said E F in (etc., describe particularly the building, place and locality), for the purposes aforesaid, and for unlawful gaming. C D.

Sworn to and subscribed before me, this ——— day of ———.

A B, Justice of the Peace (or Mayor of, etc.)

Form and directions for complaint for search-warrant for forged or counterfeited instruments, coin, brands, labels, and trade-marks.

(Set out a complaint, and charge for same offense defined in §§ 13083, 13101, of the General Code, and before the conclusion of the complaint, add as follows:)

And affiant believes, and has good cause to believe, that the said E F now has in his possession, and keeps in the dwelling-house of him, the said E F (or other place, particularly describing it; and describe also the counterfeited or forged matter, and the quantity of the same, as near as may be, and the unlawful purpose for which it is had in his possession, and conclude as in other complaints).

Sec. 13484. Search warrant, and what it shall contain.

The warrant for search shall be directed to the proper officer, and, by a copy of the affidavit inserted therein or annexed and referred to, shall show or recite all the material facts alleged in the affidavit, and particularly describe the thing to be searched for, the house or place to be searched, and the person to be seized. Such warrant shall command the officer to search such house or place for the property or other things, and, if found, to bring them, together with the person to be seized, before the magistrate or another magistrate of the county having cognizance thereof. The command of the warrant shall be that the search be made in the day-time, unless there is urgent necessity for a search in the night, in which case a search in the night may be ordered. (R. S. § 7122; 66 v. 289, §§ 15, 16.)

See § 13504 as to when door may be broken open to execute a search warrant.

For cases in which the statutory provisions relating to search warrants were not observed in that the person in whose house goods were found was not arrested, see Eichenlaub v. State, 36 O. S. 140.

Where one falsely and maliciously publishes of and concerning another, that his house had been searched, under legal process, for the discovery of goods recently stolen, and supposed to be secreted therein, he is guilty of libel. State v. Smily, 37 O. S. 30.

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Sec. 13485. Form of search warrant.

A warrant for search substantially in the form following shall be sufficient:

The State of Ohio, ——— County, ss.:

To any constable of said county, greeting:

Whereas, there has been filed with me an affidavit, of which the following is a copy: (Here copy the affidavit.)

These are, therefore, to command you, in the name of the State of Ohio, with the necessary and proper assistance, to enter, in the day-time (or in the night-time), into (here describe the house or place as in the affidavit) of the said E F, of the township of ——— in the county aforesaid, and there diligently search for the said goods and chattels, to-wit: (Here describe the articles as in the affidavit), and that you bring the same, or any part thereof, found on such search, and also the body of E F, forthwith before me, or some other magistrate of the county having cognizance thereof, to be disposed of and dealt with according to law.

Given under my hand, this ——— day of ———, ———.

A B, Justice of the Peace.

(R. S. § 7123; 35 v. 87, § 33; S. & C. 816.)

This section authorizes private citizens to arrest without warrant, but the persons arrested can only be detained until "a warrant can be obtained." Eichenlaub v. State, 36 O. S. 140.

Sec. 13486. Property seized to be kept by magistrate.

When the warrant is executed by the seizure of the property or things described therein, such property or things shall be kept by the magistrate to be used as evidence. (R. S. § 7124; 66 v. 289, § 17.)

Sec. 13487. Disposition of property when accused held for trial.

If, upon the examination, the magistrate is satisfied that the offense charged with reference to the things seized has been committed, he shall keep such things, or deliver them to the sheriff of the county, there to remain until the accused is tried, or the claimant's right is otherwise ascertained. (R. S. § 7125; 66 v. 290, § 18.)

By virtue of this section a slot machine, which the evidence shows was used for gambling, seized under a search warrant may be retained until the trial of the accused. Engelhardt v. Kumming, 10 N. P. (N.S.) 609.

Sec. 13488. Disposition of same when accused is discharged or convicted.

If the accused is discharged by the magistrate or the court, the property or other things seized shall be returned to the person in whose possession they were found. If he is convicted, the property shall be returned to its owner, and the other things shall be destroyed under the direction of the court. (R. S. § 7126; 66 v. 290, § 19.)

When a mayor finds from the evidence that certain slot machines are gambling devices he may properly order their destruction, and apply the money therein toward the payment of costs. Engelhardt v. Kumming, 10 N. P. (N.S.) 609.

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Sec. 13489. When money or property seized liable for payment of fines, etc.

Upon conviction of a person for keeping a room or place to be occupied or used for gambling or knowingly permitting gambling to be conducted therein, or permitting a game to be played for gain or a gaming device to be kept in a house or other place, or exhibiting a gaming device for gain, money or other property or for betting or gambling, or permitting such device to be so used, or for being without a fixed residence and in the habit of gambling, if money or other property, won in gaming, be found in his possession, it shall be liable for a judgment which may be rendered against him growing out of such violation of law. (R. S. § 7127; 66 v. 290, § 20.)

Money found in a slot machine used in gambling may be kept by the magistrate and applied to the payment of costs. Engelhardt v. Kumming, 10 N. P. N. S. 609.

Sec. 13490. Search for dead bodies.

When an affidavit is filed before a judge, justice of the peace, mayor or police judge alleging that affiant has good reason to believe and does believe that a dead human body, procured or obtained contrary to law, is secreted in a building or place in the county, therein particularly specified, such judge or magistrate, taking with him a justice of the peace, or if within a municipal corporation, two officers of such corporation, may enter, inspect and search such building or place for such body. In making such search, they shall have the powers of officers executing warrants of search. (R. S. § 7128; 44 v. 77, § 2; S. & C. 437.)

Sec. 13491. Search in case of intended violation of law relating to animals.

When complaint is made, on oath or affirmation, to a magistrate or court authorized to issue warrants in criminal cases, that the complainant believes that the law relating to or affecting animals is being or is about to be violated in a particular building or place, such magistrate or court shall forthwith issue and deliver a warrant directed to any sheriff, constable, police officer, or agent of a society for the prevention of cruelty to animals, authorizing him to enter and search such building or place, and arrest all persons there violating or attempting to violate such law, and bring such persons before a court or magistrate of competent jurisdiction within the city, village or county within which such offense has been committed, to be dealt with according to law.

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Such attempt shall be held to be a violation of such law, and shall subject the person charged therewith, to the penalties thereof. (R. S. § 3719; 72 v. 129, § 17.)

Magistrates may authorize an examination of certain places for the purpose of detecting any violation of law in regard to animals. Muhlhauser v. State, 1 C. C. (N.S.) 273, 15 O. C. D. 84.

Order for destruction of property taken on search warrant.

(Title.) It is ordered by the court that the (here specify specifically the articles of property to be destroyed) heretofore found in possession of the defendant E F and seized by virtue of a search warrant issued by (here set forth the name and title of the justice of the peace or other magistrate issuing the warrant) be burned by the sheriff of this county.

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CHAPTER VI.

ARREST, EXAMINATION AND BAIL.

SECTION

ARREST.

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ARREST.

Sec. 13492. Who may arrest.

A sheriff, deputy sheriff, constable, marshal, deputy marshal, watchman or police officer, shall arrest and detain a person found violating a

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law of this state, or an ordinance of a city or village, until a warrant can be obtained. (R. S. § 7129; 66 v. 291, § 21.)

Where an officer, authorized by statute to make arrests without a warrant, finds a person in the act of committing a criminal offense, it is not necessary to the lawfulness of an attempt to arrest him to first inform him of the charge upon which the attempted arrest is made, where the officer and the cause of the arrest are known to the offender. Wolf v. State, 19 O. S. 248.

In a prosecution for manslaughter against an officer, authorized by statute to make an arrest without a warrant, for killing the deceased while in the attempt to arrest him without a warrant, and it appearing that the deceased, knowing the officer and the cause of arrest, violently resisted the arrest, it is error to charge the jury that it was unlawful for the officer to use force in return to make the arrest, or to defend himself from the attack of the offender, without notice to him of the cause of arrest, or the abandonment of the attempt to make the arrest. Wolf v. State, 19 O. S. 248.

An officer, authorized by statute to make arrests without a warrant, is authorized, without warrant, to arrest a person found on the public streets of the corporation carrying concealed weapons contrary to law, although he has no previous personal knowledge of the fact, if he acts *bona fide*, and upon such information as induces an honest belief that the person arrested is in the act of violating the law. Ballard v. State, 43 O. S. 340.

Where a breach of the peace is committed in the presence of a marshal of an incorporated village or city, he may without warrant arrest the person who participated therein. If, however, the officer was absent when such offense was committed, and did not appear there until after the affray had ended, public order restored, and the guilty parties had departed from the vicinity, and all the information the officer had of the affray, and of the parties to it, was the statements of bystanders who witnessed it, he has no authority in law to pursue and arrest the persons charged with the offense without first obtaining a legal warrant therefor. State v. Lewis, 50 O. S. 179; Reinhardt v. State, 49 O. S. 257, 265.

A police officer, as a private individual, under the provisions of this section, is not authorized, on mere suspicion, and without a warrant therefor, to arrest and confine a person on the charge of being a deserter from the United States army; especially is this the case when the person so arrested is not guilty of the charge. Kendal *et al* v. Schieve, 3 C. C. 526; 2 O. C. D. 303.

The marshal of a hamlet has authority to arrest any person he sees violating an ordinance of the hamlet, without a warrant, and if he brings the offender without delay before the proper magistrate and he is there tried and convicted, he is fully protected against any liability for damages for the arrest of the offender without warrant. Billington v. Hoverman, 18 C. C. 637; 7 O. C. D. 358.

Council may authorize officers to arrest upon view, for breach of city ordinance. White v. Kent, 11 O. S. 550.

See Eichenlaub v. State, 36 O. S. 140, 144.

An officer may arrest without warrant a person whom he believes, and had reasonable cause to believe guilty of an offense, and detain him until a legal warrant could be obtained; and where he arrests on Saturday and takes all necessary steps to prosecute, and then on Monday he is kept away from court, it is held he is not bound to remain to prosecute the suit or to see that the necessary

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affidavits are filed. At least the question of any unreasonable delay in the omission of any duty which he was called upon to perform in the case should be left to the jury. Raitz v. Green, 13 C. C. 455; 7 O. C. D. 238.

A conviction is conclusive of the right of the officer to make the arrest. Billington v. Hoverman, 7 O. D. 358.

Where the accused is armed and the arresting officer sees that he is ready to resist by taking life, he may use any strategy to disarm the accused and arrest him without first producing the warrant. State v. Miller, 13 C. C. 82; 7 O. C. D. 552; aff'd 55 O. S. 685.

A police court has no jurisdiction over an accused person, and no power or authority to try his cause or impose sentence upon him, except on a warrant issued on oath or affirmation charging him with the commission of a crime. Stief v. Cincinnati, 6 O. L. R. 602.

An arrest of a passenger for intoxication and without a warrant, where made in a railway train standing in a depot, and his detention for action by the proper authorities, is not illegal where made by an employe of the railway company who has been regularly qualified and commissioned as a police officer. Erie Railway v. Reigherd, 7 O. L. R. 485, 16 O. F. D. 360.

All right to deny the legality of an arrest without a warrant is waived by consent to the dispensing with the filing of an affidavit and entering of a plea of guilty, and an action thereafter for false imprisonment will not lie. Erie Railway v. Reigherd, 7 O. L. R. 485, 16 O. F. D. 360.

Every constable is a conservator of the peace, and it is his duty, within his jurisdiction, "to apprehend and bring to justice all felons and disturbers and violators of the criminal laws of the state," without other reward or compensation therefor than such as is fixed and allowed by law. Bank v. Edmund, 76 O. S. 396.

A constable has full authority under this section to arrest one found violating the Sunday liquor law and hold him until a warrant can be obtained. Murray v. State, 6 N. P. (N.S.) 155, 18 O. D. 286.

A police officer has no authority to arrest for petit larceny without a warrant when the offense has been completed at the time of the arrest and was not witnessed by the officer. Hopper v. Mabley & Carew Co., 14 O. D. 236.

A mayor may arrest one found in a state of intoxication within the limits of the municipality although no warrant or affidavit for the arrest has been made. Garrison v. Bricker, 54 Bull. 497, 7 O. L. R. 337.

Where A had been arrested by B, a village marshal, for carrying a concealed weapon, and in attempting to escape from the custody of B was pursued and shot by him, the act of B amounted to official misconduct, since A's crime was a misdemeanor only, for which sureties on his official bond are liable. Rischer v. Meehan, 11 C. C. 403, 5 O. C. D. 416.

To justify an arrest, under this section, of one who is found violating an ordinance of a city or village, the ordinance must be shown to be valid; or if it is valid in part and invalid in part, it must be shown that the arrest was made by virtue of the valid portion. In re Smith, 14 N. P. (N.S.) 497, 23 O. D. 667.

A police officer under the provisions of this section, or as a private individual under G. C. § 13493, has no authority to arrest, without a warrant, one whom he believes to be a deserter from the United States army. Kendall v. Scheve, 3 C. C. 526, 2 O. C. D. 303.

A tramp who is carrying dangerous weapons may be arrested by an officer without warrant. State v. Pate, 7 N. P. 543, 5 O. D. 732.

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The officer making the arrest should use only such force as is necessary for the purpose, and for any excessive force he becomes liable. State v. Pate, 7 N. P. 543, 5 O. D. 732.

Where an arrest is made without a warrant, the arresting officer should within a reasonable time secure a warrant, and during the interval should use only such means and methods for detaining the party under arrest as are reasonable and necessary under the circumstances; and in an action for damages for false arrest and imprisonment, the question whether the arresting officer so acted is one of fact for determination by the jury. Williams v. Morris, 14 C. C. (N.S.) 353, 22 O. C. D. 453, 56 Bull. 313.

A deputy sheriff or other person authorized by law to make arrests may, on view, arrest persons found violating G. C. § 12525 of the fish and game act, and not be liable for false arrest, notwithstanding the provision that the prosecutions may be instituted only upon complaint of the owner or agent of the owner of the lands or rights in lands or waters, where the trespass was committed. Williams v. Morris, 14 C. C. (N.S.) 353, 22 O. C. D. 453, 56 Bull. 313.

Where the arrest was not illegal and there was no false imprisonment, it is error to instruct a jury that they may allow as compensatory damages an attorney's fee for services incurred in setting aside the proceedings of a justice of the peace had on a defective warrant. Williams v. Morris, 14 C. C. (N.S.) 353, 22 O. C. D. 453, 56 Bull. 313.

An instruction to the jury in an action for false imprisonment that they may, if they choose, include attorney's fees as a part of the compensatory damages, is erroneous where the qualification is not added that such an award can only be based on a finding that the defendant acted through fraud or malice or for purpose of insult. Sly v. Robinson, 20 C. C. (N.S.) 297.

There is no statutory authority in Ohio for serving a warrant on an officer of the corporation against which a complaint is lodged before a magistrate by arresting such officer. Reinhart & Newton Co. v. State, 15 N. P. (N.S.) 92, 23 O. D. 500.

A police officer is not authorized to arrest a person, passing peacably along a highway without a warrant, on a mere venture without any knowledge or reliable information, though in fact, as afterwards discovered, concealed weapons were found on the person so arrested. Rasey v. Ciccolino, 1 O. A. R. 194, 24 O. C. D. 294, 18 C. C. (N.S.) 331.

Sec. 13493. When any person may arrest.

When a felony has been committed, any person without warrant, may arrest another whom he has reasonable cause to believe is guilty of the offense, and detain him until a warrant can be obtained. If such warrant directs the removal of the accused to the county in which the offense was committed, the officer holding the warrant shall deliver the accused to a magistrate of such county, to be dealt with according to law. The necessary expense of such removal, and reasonable compensation for his time and trouble, shall be paid to such officer, out of the treasury of such county, upon the allowance and order of the county auditor. (R. S. § 7130; 66 v. 291, § 22; 29 v. 112, § 3; S. & C. 1398.)

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See notes to decisions under § 13492.

A person who has been arrested without a warrant can not lawfully be held in custody for any longer period than is reasonably necessary to obtain a legal warrant for his detention. Where he is held for a longer period without such writ or other authority from a competent court, he has a right of action for false imprisonment against the officer or person who made the arrest and those by whom he has been so unlawfully held in custody. Leger, et al., v. Warren, 62 O. S. 500.

In such an action it is not a defense for the officer who made the arrest that he acted under orders from a superior officer. By the failure to procure the necessary warrant or authority for the prisoner's detention, the imprisonment becomes unlawful from the beginning, and all concerned in it are equally liable. Leger, et al., v. Warren, 62 O. S. 500.

A police officer is authorized to arrest without a warrant a person whom he believes is guilty of having committed an offense and to detain him until an affidavit and legal warrant can be obtained; and where he arrests such person on Saturday, and takes all necessary steps for his trial at the next session of the police court on Monday, and being on Monday detained by important duties, he may suppose that the duties connected with the case of such person will be properly attended to by the officers of that court, and he is not bound to leave more weighty matters and remain, for the purpose of prosecuting this suit, or to see that the affidavits were filed that morning. At least the question should be submitted to the jury, to determine whether he had been guilty of any unreasonable delay in the omission of any duty which he was called upon to perform in connection with the case. Raitz v. Green, 13 C. C. 455, 7 O. C. D. 238.

A police officer, under the provisions of G. C. § 13492, or as a private individual under this section, is not authorized, on mere suspicion and without a warrant, to arrest a person on the charge of being a deserter from the United States army. Kendall v. Scheve, 3 C. C. 526, 2 O. C. D. 303.

One who causes the arrest of another may show the bad character of the person arrested as evidence to show the likelihood that the accused committed the crime. Britton v. Granger, 13 C. C. 281, 7 O. C. D. 182.

This section does not authorize a police officer who has received a telegram to the effect that one who has committed a crime in another city may arrive upon certain trains, to arrest without warrant one who is passing along the railroad track in a peaceable manner, who is not acting so as to arouse suspicion, who has not acted so as to indicate that he came from the train in question. Rasey v. Ciccolino, 1 O. A. R. 194, 18 C. C. (N.S.) 331, 24 O. C. D. 294.

Before a person can lawfully be arrested without a warrant, a felony must have been committed, and the person who makes or procures the arrest must believe, and have reasonable cause to believe, that the person arrested is guilty of the offense. Burch v. Franklin, 7 N. P. 155, 7 O. D. 519.

There can be no detention of anyone for a longer time than is necessary to secure a warrant under our laws, and neither the arresting officer nor the court can legally hold and try anyone until a warrant is first obtained. A police court has no jurisdiction to arraign, try and sentence upon an affidavit, without warrant, one charged with carrying concealed weapons. Stief v. Cincinnati, 19 O. D. 484, 6 O. L. R. 602.

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Sec. 13494. Who may issue warrants.

Justices of the peace, police judges and mayors of cities and villages may issue process for the apprehension of a person charged with an offense and execute the powers conferred and duties enjoined in this title. (R. S. § 7131; 66 v. 291, § 23.)

Where a justice of the peace, without authority of law, issues a warrant of arrest, both he and the person at whose instance he so acts are liable, in an action for false imprisonment, at the suit of the party illegally arrested by virtue of such warrant. Truesdell v. Combs, 33 O. S. 186.

An affidavit for arrest for larceny is loosely drawn where the thing taken is described only as "merchandise," but a justice of the peace acting in good faith in the issuing of a warrant upon such an affidavit is not liable to an action for false imprisonment. Sly v. Robinson, 20 C. C. (N.S.) 297.

A clerk of a police court by virtue of G. C. § 4594 may issue a warrant upon affidavit properly filed. Molitor v. State, 6 C. C. 263, 3 O. C. D. 445.

The legality of a prisoner's detention is to be determined by the circumstances existing at the time of the hearing, and not those existing at the time of the application for a writ of habeas corpus; if a warrant has been issued at the time of the hearing it will be sufficient ground upon which to refuse the writ. Healy, Ex parte, 8 O. D. 692, 39 Bull. 250.

Sec. 13495. Magistrates may issue subpoenas; form of subpoena.

Justices of the peace, police judges and mayors may issue subpoenas and other process to bring witnesses before them. In complaints to keep the peace and cases of misdemeanor, the subpoena must be served within the county, and in other cases it may be issued to or served in any county. Subpoenas substantially in the form following shall be sufficient:

The State of Ohio, ——— County, ss.:

To any constable of the county, greeting:

You are hereby commanded to summon ——— to be and appear before me, the undersigned authority, at ——— forthwith, and there to give testimony and the truth to say touching a certain complaint made in behalf of the State of Ohio against C D.

Given under my hand, this ——— day of ———, ———.

A. B., Justice of the Peace.

(R. S. § 7132; 35 v. 87, § 33; S. & C. 819.)

A marshal is a ministerial officer of the mayor's court, and the constable is a ministerial officer of a justice's court. Process from a justice to the marshal of a village is void. Heister, Ex parte, 8 Dec. Rep. 41, 5 Bull. 286.

Service and form of return of subpoena.

The officer serving a subpoena is required to show by his return the number of miles each witness resides from the magistrate's office, and he should also show

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the manner of serving each one, whether by reading, or stating the contents to the witness, or by copy left at his residence, and also what witnesses are not found or served at all.

——— ———, A. D. 19—, I received this writ; and afterward I served the same in the manner and at the times shown by the annexed list and table; that is, I read this writ to the witnesses whose names are marked R; I stated its contents to those whose names are marked S; and I left a copy hereof at the usual place of residence of those whose names are marked C. The others are not found.

J W., Constable.

MY FEES.

Mileage, ——— miles .....$———
Service on ——— witnesses..... ———
——— copies ..... ———

Amount ....$———

WITNESSES.	How Served...	Day of Service	Miles Distant..
John Jones	R.	January 9	6
William Smith	S.	" 14	10
George Wallace	C.	" 11	2

Sec. 13496. When a warrant shall issue.

When an affidavit charging a person with the commission of an offense is filed with a justice of the peace, mayor or police judge, if he has reasonable ground to believe that the offense charged has been committed, he shall issue a warrant for the arrest of the accused. (R. S. § 7133; 66 v. 291, § 24.)

That the ordinance was subsequently declared invalid, does not render the mayor or citizen making the affidavit liable for false imprisonment: Wheeler v. Gavin, 5 C. C. 246, 250.

If no affidavit was in fact filed, a motion to quash the indictment lies: Weisbrodt v. State, 50 O. S. 192.

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The provision of § 13496 for the arrest of an accused person is not applicable to a corporation, but where in a prosecution of a corporation the president is arrested and taken before a justice of the peace, failure to take advantage of the irregularity by objecting to the jurisdiction of the court amounts to submission to its jurisdiction and a general appearance and prevents further question as to jurisdiction over the defendant corporation on the ground of improper service. Reinhart & Newton v. State, 26 C. C. (N.S.) 429 (affirming 15 N. P. (N.S.) 92).

The exception found in the statute prohibiting the employment of females over eighteen years of age more than ten hours in one day, made applicable to "canneries or establishments engaged in preparing for use perishable goods," does not apply to candy factories. Reinhart & Newton v. State, 26 C. C. (N.S.) 429 (affirming 15 N. P. (N.S.) 92).

Where the arrest was not illegal and there was no false imprisonment, it is error to instruct a jury that they may allow as compensatory damages an attorney's fee for services incurred in setting aside the proceedings of a justice of the peace had on a defective warrant. Williams v. Morris, 14 C. C. (N.S.) 353, 22 O. C. D. 453.

For form of search warrant to enforce local option laws, see G. C. § 6174.

This section, together with G. C. § 13492, authorizes the arrest and detention of one violating the Sunday liquor law, by a constable, until a warrant can be obtained. Murray v. State, 6 N. P. (N.S.) 155, 18 O. D. 286.

Sec. 13497. Form of affidavit.

An affidavit substantially in the form following shall be sufficient:

The State of Ohio, ——— County, ss.:

Before me, A B, personally came C D, who, being duly sworn according to law, deposes and says that on or about the ——— day of ———, at the county of ———, one E F, (here describe the offense committed, as nearly according to the nature thereof as the case will admit).

C. D.

Sworn to and subscribed before me, this ——— day of ———, ———.

Justice of the Peace.

(R. S. § 7134; 35 v. 87, § 33; S. & C. 816.)

An affidavit filed before a justice of the peace, charging a person with petit larceny, will authorize his arrest, an inquiry into the complaint, and his recognizance to the proper court, and confer jurisdiction on the latter, if it describe, substantially, the commission of the offense. The failure to insert in such affidavit the name of the owner of the property which is alleged to have been stolen, does not entitle the defendant to a reversal of the proceedings. Montgomery v. State, 7 O. S. 107.

For a sufficient form of an affidavit charging nonsupport of minor children, see Burns v. Tarbox, 76 O. S. 520.

In a prosecution before a police court an affidavit charging the crime as having been committed in Lucas county is cured by an information subsequently filed charging the offenses as having been made in the city of Toledo. Krowenstrot v. State, 15 C. C. 73, 8 O. C. D. 119.

It is not necessary that the negative averments of G. C. § 1642, relating to jurisdiction over and with respect to delinquent and dependent and neglected minors, shall be incorporated in the affidavits under which arrests are made. Walton v. State, 3 O. A. R. 97, 10 C. C. (N.S.) 452.

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The white heron is a game bird, and it is included within the terms of G. C. § 1409. An affidavit which charges that defendant had in possession and offered for sale the plume of a bird known as the white heron does not state an offense under this section. State v. Solomon, 14 C. C. (N.S.) 590, 23 O. C. D. 251.

An affidavit for arrest for larceny is loosely drawn where the thing taken is described only as "merchandise," but a justice of the peace acting in good faith in the issuing of a warrant upon such an affidavit is not liable to an action for false imprisonment. Sly v. Robinson, 20 C. C. (N.S.) 297.

An affidavit omitting the first name of the accused and describing it by initials only, is not void. State v. Miller, 13 C. C. 67, 7 O. C. D. 552.

An information, charging a misdemeanor, unsupported by oath or affirmation, is insufficient. Gates v. State, 3 O. S. 293; Eichenlaub v. State, 36 O. S. 140; Smith v. State, 12 C. C. 458, 4 O. C. D. 35.

An affidavit that the affiant "has good reason to believe and does thoroughly believe" that the accused committed the offense charged on certain dates is insufficient. United States v. Carter, 5 O. F. D. 592, 14 Bull. 191.

An affidavit made on the belief of the person filing it, which does not state the facts absolutely, while it may be open to objection, does not, in the absence of a motion to quash, deprive the court of jurisdiction. Pope v. Cincinnati, 3 C. C. 497, 2 O. C. D. 285.

An affidavit, charging the violation of a municipal ordinance prohibiting the keeping of a place for the sale of intoxicating liquors, which charges the keeping "at" the village of Westerville is sufficient, since the preposition "at" in criminal prosecutions is equivalent to the prepositions "in" or "within." Volk v. Westerville, 3 N. P. (N.S.) 241, 11 O. D. 144.

An affidavit need not conclude with the words "contrary to the form of the statute in such case made and provided and against the peace and dignity of the state of Ohio." Fendrick v. State, 17 O. D. 73, 4 O. L. R. 350.

An affidavit made substantially in the words of the statute defining the offense, is sufficient. Emery v. State, 3 N. P. 204 (affirmed, 55 O. S. 364).

Insufficient affidavit. State v. Groenland, Sup. Ct., no report, 39 W. L. B. 2.

Sec. 13498. Form of affidavit in certain cases.

When applicable, the following form of affidavit shall be sufficient in criminal proceedings before justices of the peace or mayors where the misdemeanors charged are:

1. Keeping a place where intoxicating liquors are sold in violation of law;

2. Buying intoxicating liquor for, or furnishing it to a minor or person intoxicated;

3. Selling, giving away or disposing of intoxicating liquor nearer to a public gathering than is permitted by law;

4. Selling intoxicating liquor or keeping a house of ill-fame nearer to a public institution than is permitted by law;

5. Conveying spirituous or malt liquor or wine into a jail, or permitting a prisoner therein to receive it;

6. Selling or giving away spirituous, vinous or malt liquor on election day, or failing to keep closed upon election day, a house where such liquor is habitually sold and drank;

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Such affidavit may be varied to suit the nature of the case, namely:

State of Ohio, ——— County, ss.:

Before me, A B, a justice of the peace for said county (or mayor of, etc., as the case may be), personally came C D, who, being duly sworn according to law, deposeth and saith, that on or about the ——— day of ———, in the year ———, at the county of ——— aforesaid, E F did sell intoxicating liquors to one G H, to be drank in the place where sold (or to G H, a minor, etc., or a person intoxicated, or in the habit of getting intoxicated, as the case may be), or is the keeper of a room or tavern (as the case may be), where intoxicating liquors are sold in violation of law, and further saith not.

Signed, C D.

Sworn to and subscribed before me, this ——— day of ———, A. D. ———. A B, Justice or Mayor, etc.

(R. S. § 7135; 52 v. 153, § 12; S. & C. 1435.)

In an affidavit the same strictness is not required as an indictment or information. Parker v. State, 4 O. S. 563.

An affidavit by the person injured, for a misdemeanor, should show that the complaint is made by the person injured. In general, it will be very easy to do this by simply inserting the words, "the said," before the name of the person injured where it first occurs in the charge; this will make it refer to the complainant, as his name is always inserted in the commencement of the affidavit. This is necessary because, upon a plea of guilty to a complaint by the party injured, for a misdemeanor, the magistrate has power to render judgment and sentence against the accused. General Code § 13510.

An affidavit on belief is sufficient, no motion to quash being made. Pope v. Cincinnati, 3 C. C. 497.

The information may vary from the affidavit within the limits within which an indictment may vary the charge. Schmeltz v. State, 8 C. C. 82, 1 O. C. D. 214.

The affidavit need not state that the defendant knew the person to whom the liquor was sold was in the habit of getting intoxicated, the affidavit not requiring the same strictness as an indictment or information. Parker v. State, 4 O. S. 563.

An affidavit substantially in the above form is sufficient, thus charging keeping a room wherein intoxicating liquors are sold, etc., states a fact and not a conclusion. Brown v. Van Wert, 4 C. C. 407, 410 (otherwise reversed in 47 O. S. 477).

An affidavit charging an "unlawful sale of a certain quantity of wine in a package containing about 26 gallons, as and for blackberry wine, a certain compound and mixture consisting of wine, sugar, water, alcohol, salicylic acid and aniline red," is sufficient. Myer v. State, 10 C. C. 226, 6 O. C. D. 477 (affirmed, 54 O. S. 242).

An affidavit which fails to state that the liquor was sold for use as a beverage is fatally defective. Vester v. State, 1 N. P. 240, 2 O. D. 170.

Sec. 13499. When security for costs of prosecution required; when not required.

When the offense charged is a misdemeanor the magistrate, before issuing the warrant, may require the complainant, or, if he considers

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the complainant irresponsible, may require that he procure a person to become liable for the costs if the complaint be dismissed, and the complainant or other person shall acknowledge himself so liable and such magistrate shall enter such acknowledgment on his docket. Such bond shall not be required of a sheriff, deputy sheriff, constable, marshal, deputy marshal, watchman or police officer, when in the discharge of his official duty. (R. S. § 7136; 80 v. 198; 66 v. 291, § 25.)

In a prosecution to keep the peace, there is no authority to pay the costs from the county treasury. Raber v. Auditor, 12 O. S. 429.

To authorize a judgment for costs against a prosecuting witness, under the provisions of the probate court code, the person accused must have been acquitted either by the probate judge or by a jury of twelve men. Sovereign v. State, 4 O. S. 489.

If a magistrate, such as the judge of a municipal court, decides that an affidavit is insufficient, and refuses to issue a warrant thereon, his judgment and discretion can not be controlled by mandamus; but if he refuses to exercise such judgment or discretion, and arbitrarily refuses to issue such warrant, without passing upon the question of the sufficiency of such affidavit, or if he refuses because of his knowledge of facts outside of the affidavit, he may be compelled to issue such warrant by mandamus. McGannon v. State, ex rel., 23 C. C. (N.S.) 301.

The provision in R. S. § 6906-2 (repealed, 97 O. L. 477), that the costs of prosecuting violations of the fish and game laws should be paid from the county treasury is an exception to the general rule prescribed by this section in prosecutions for misdemeanors. State, ex rel., v. Lewis, 5 N. P. 394, 5 O. D. 371.

There is no authority for the payment of fees out of the county treasury to a humane officer for services rendered by him in cases prosecuted before a justice of the peace by a humane society under the laws of the state. State v. Kleinhoffer, 92 O. S. 163.

Sec. 13500. What warrant to contain, and to whom directed.

The warrant shall be directed to the sheriff or to any constable of the county, or, when it is issued by an officer of a municipal corporation, to the marshal or other police officer thereof, and, by a copy of the affidavit inserted therein or annexed and referred to, shall show or recite the substance of the accusation and command such officer forthwith to take the accused and bring him before the magistrate or court issuing such warrant, or other magistrate of the county having cognizance of the case, to be dealt with according to law. (R. S. § 7137; 68 v. 3, § 1; 36 v. 18, § 1; S. & C. 1402.)

A warrant for the arrest of an accused party, in all other respects legal, but describing him by the initials of his first and middle name, is not void for that reason, and the same is a sufficient process to justify the officer in making the arrest; and this is so, if the affidavit upon which the warrant is issued contains a similar description of the accused. State v. Miller, 13 C. C. 67; 7 O. C. D. 552 (affirmed by supreme court, 55 O. S. 685).

Also true, where the affidavit upon which the warrant is issued contains a similar description. Id.

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An affidavit and warrant do not charge a violation of the Sunday closing law or the performance of common labor on Sunday, if there is a failure to charge knowledge and criminal intent on the part of the accused. Goldsmith v. State, 13 C. C. (N.S.) 148, 22 O. C. D. 160.

The venue of an offense is not sufficiently stated, where the substance of the accusation is not set forth in the warrant, or the affidavit incorporated therein, or attached to and referred to in the warrant, and neither the affidavit nor the warrant contains any allegation as to the county in which the offense is alleged to have occurred. Goldsmith v. State, 13 C. C. (N.S.) 148, 22 O. C. D. 160.

An affidavit and warrant do not charge a violation of the Sunday closing law or the performance of common labor on Sunday, if there is a failure to charge knowledge and criminal intent on the part of the accused. The performance of common labor on Sunday and the causing of a place to be opened for the transaction of business on Sunday are distinct offenses, and an affidavit and warrant which charge them as one offense are bad for duplicity. Goldsmith v. State, 13 C. C. (N.S.) 148, 22 O. C. D. 160.

A warrant charging common labor on Sunday is insufficient, if it does not set out the negative averments that the labor performed was not a work of necessity or charity and that it did not come within the other saving clauses of the statute. Goldsmith v. State, 13 C. C. (N.S.) 148, 22 O. C. D. 160.

A warrant for arrest issued by the mayor of a municipality without affixing to it his official seal, as provided in G. C. § 4549, is invalid. Lenarcie v. State, 23 C. C. (N.S.) 73.

Sec. 13501. Form of warrant.

A warrant substantially in the form following shall be sufficient:

The State of Ohio, ——— County, ss.:

To any constable of said county, greeting:

Whereas, There has been filed with me an affidavit, of which the following is a copy: (here copy the affidavit).

These are therefore to command you take the said E F, if he be found in your county, or, if he has fled, that you pursue after him into any other county in the state, and take and safely keep the said E F, so that you have his body forthwith before me, or some other magistrate of said county, to answer the said complaint, and be further dealt with according to law.

Given under my hand, this ——— day of ———.

A B, Justice of the Peace.

(R. S. § 7138; 35 v. 87, § 33; S. & C. 816.)

A warrant describing the accused by the initials of his first and middle name is not void for that reason, even though the affidavit contains a similar description. State v. Miller, 13 C. C. 67, 7 O. C. D. 553.

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Sec. 13502. Accused may be pursued and arrested in any county.

If the accused flee from justice, the officer holding the warrant may pursue and arrest him in any county of this state, and convey him before the magistrate or court issuing the warrant, or other magistrate or court of the county having cognizance of the case. (R. S. § 7139; 68 v. 3, § 1.)

The plaintiff being in the custody of the defendant, Meehan, as marshal of the city of Wellsville, having been arrested by such marshal for fighting on the streets and for carrying a concealed weapon, attempted to escape, and fled, and in arresting his flight, and for the purpose of recapturing him, such officer shot and wounded the plaintiff. *Held*, that the plaintiff being under arrest for the commission of misdemeanors only, the act of the officer in shooting him, for the purpose aforesaid, was unlawful, and an act of official misconduct, for which the sureties on his official bond are responsible. Rischer v. Meehan, 11 C. C. 403; 5 O. C. D. 416.

Sec. 13503. Warrant may issue in county to which he has removed.

If a person charged with an offense abscond or remove from the county in which such offense is alleged to have been committed, a magistrate of the county in which such person is found may issue a warrant for his arrest and removal to the county in which the offense is alleged to have been committed, to be delivered to a magistrate of such county, who shall cause such person so delivered to be dealt with according to law. Such warrant shall have like force and effect as if issued from the county in which the offense is alleged to have been committed. (R. S. § 7140; 66 v. 291, § 28.)

Form of state warrant where the offense was committed in another county.

(Follow the form in § 13501, using the appropriate affidavit, and then proceed thus;)

These are therefore to command you to forthwith take the said E F, if he be found in your county, and him, the said E F, to safely keep, so that you remove his body to the said county of ———, and there forthwith deliver the body of the said E F to any magistrate of said county having lawful cognizance of the case of said offense so committed, to answer said complaint, and be further dealt with according to law.

Given under my hand, this ——— day of ———, 19—.

Sec. 13504. Officer may break outer doors, etc.

In executing a warrant for the arrest of a person charged with an offense, or a search-warrant, the officer may break open an outer or inner door or window of a dwelling-house or other building, if, after notice

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of his office and purpose, he is refused admittance. But an officer executing a search warrant shall not enter a house or building not described in the warrant. (R. S. § 7141; 66 v. 292, § 29.)

Where the officer holding such warrant finds the accused armed with deadly weapons, ready to resist arrest by taking his life, such officer has the right, without first producing the warrant to disarm the accused, and to use necessary strategy and deception for that purpose in order to make the arrest without peril to his own life; and it is sufficient, in such case, to produce and read the warrant, if requested, after the accused is so taken into custody. State v. Miller, 13 C. C. 68; 7 O. C. D. 552. Affirmed by Supreme Court, 55 O. S. 685.

Sec. 13505. Notice given when member or officer of general assembly arrested.

If, during a session of the general assembly, a member or officer thereof is arrested upon a charge of treason, felony or breach of the peace, notice thereof shall be given forthwith to the body with which he is connected, by the officer issuing the process upon which such arrest is made. (R. S. § 5460; 29 v. 341, § 9; S. & C. 84.)

EXAMINATION.

Sec. 13506. Officer to take prisoner before magistrate and return warrant.

When the officer holding the warrant arrests the accused, he shall take him before the proper magistrate, and, having indorsed and signed a proper return on the warrant, shall deliver it to the magistrate. (R. S. § 7142; 66 v. 292, § 30.)

Where an arrest is made without a warrant, the arresting officer should within a reasonable time secure a warrant, and during the interval should use only such means and methods for detaining the party under arrest as are reasonable and necessary under the circumstances; and in an action for damages for false arrest and imprisonment, the question whether the arresting officer so acted is one of fact for determination by the jury. Williams v. Morris, 14 C. C. (N.S.) 353, 22 O. C. D. 453, 56 Bull. 313.

Form of return of a state warrant with the body.

January 9, 19—. I took the body of the within named E F, and have him before the magistrate within named (or before some other magistrate, naming him).

J W, Constable.

FEES.

Mileage, 6 miles..... ———
Service and return..... ———
1 assistant, 1 day..... ———

Sec. 13507. Adjournment of examination.

If it is necessary, for just cause, to adjourn the examination of the accused, the magistrate may order such adjournment and commit him to the jail of the county, until such cause of delay is removed, but the entire time of such confinement in jail shall not exceed four days. The

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officer having custody of such person, by the written order of the magistrate may detain him in custody in a secure and convenient place other than the jail, to be designated by such magistrate in his order, not exceeding four days. The officer in whose custody any person is detained shall provide for the sustenance of such prisoner while in custody. (R. S. § 7143; 66 v. 292, § 31.)

A person arrested without a warrant can not lawfully be held in custody for any longer period than is reasonably necessary to obtain a legal warrant for his detention. Leger v. Warren, 62 O. S. 500.

An examining magistrate has full authority to adjourn, for one day, the examination of a person accused of a felony and to recognize or commit the accused to jail. Fawcet v. Linthecum, 7 C. C. 141, 3 O. C. D. 700.

Upon the adjournment of the examination of one accused of crime as provided in § 7143, Revised Statutes (G. C. § 13507), it is unlawful for the magistrate to commit the accused for safe-keeping for more than four days, or to the city prison, instead of the county jail, unless the former be designated as the place of confinement by the magistrate in a written order. Washer v. Iler, 9 C. C. (N.S.) 271, 19 O. C. D. 319; affirmed, 52 W. L. B. 67.

For form of commitment pending examination, see § 13553.

Detaining prisoner in a place other than the jail.—This order may be written upon the back of the warrant in the following form:

The State of Ohio, ——— County, ss:

To J W, constable in and for said county:

Whereas, The within named E F has been brought before me, according to the command of this writ, and whereas the trial of the said E F, upon the within charge, has been necessarily postponed by reason of the absence of S H, a material witness, you are therefore hereby ordered by me to detain the said E F in your custody, in the dwelling-house of A Y, in said county, so that you have his body before me at my office, on the ——— day of ———, A. D. 19—, at ——— o'clock, — M., to answer said charge, and be dealt with according to law.

Given under my hand and seal, this ——— day of ———, A. D. 19—, at said county.

[SEAL.] A B, J P.

Form of precept for obtaining the defendant from jail.

The State of Ohio, ——— County, ss:

To any constable of the county aforesaid, greeting:

Whereas, E F has been committed to the jail of said county, on account of the adjournment of his trial, until the ——— day of ———, A. D. 19—, at 2 o'clock P. M., upon a charge on complaint in writing, upon the oath of C D, of (here set forth the offense).

You are, therefore, hereby commanded to receive the said E F, from the keeper of the jail of said county, into your custody, so that you have his body before me, A B, one of the justices of the peace of said county, at the time aforesaid, to answer said charge.

Given under my hand and seal, this ——— day of ———, A. D. 19—.

[SEAL.] A B, J P.

Sec. 13508. Recognizance when case adjourned.

When an adjournment is ordered the accused may enter into a recognizance before the magistrate, with good and sufficient surety ap-

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proved by him, in such amount as he may deem reasonable, conditioned for the appearance of such person before the magistrate, at a place, day and hour specified in the recognizance, but such adjournment shall not be for longer than twenty days without the consent of the accused. A person shall not be admitted to bail who is charged with an offense not bailable under the constitution of the state. (R. S. § 7144; 66 v. 292, § 32.)

Form of recognizance on adjournment of examination.

The State of Ohio, ——— County, ss.

Be it remembered, that on the ——— day of ———, in the year ———, E F and G H personally appeared before me, and jointly and severally acknowledged themselves to owe the State of Ohio the sum of ——— dollars, to be levied of their goods and chattels, lands and tenements, if default be made in the condition following, to-wit: The condition of this recognizance is such that if the above bound E F personally be and appear before me, at my office in the township of ———, in the said county, at ——— o'clock, — M., on the ——— day of ———, in the year aforesaid, then and there to answer the charge of ———, and abide my order, and not depart without leave, then this recognizance shall be void; otherwise it shall be and remain in full force and virtue in law.

———,

———.

Taken and acknowledged before me, the date and day first aforesaid.

———,

Justice of the Peace.

Sec. 13509. When person recognized fails to appear.

If the accused fails to appear at the time named in the recognizance or fails to comply with the conditions thereof, the magistrate shall declare such recognizance forfeited and transmit a transcript of his proceedings in the case, together with the recognizance, to the clerk of the proper court. Proceedings shall be had thereon by such court as may be expedient in a like manner as if the recognizance had been taken therein. (R. S. § 7145; 66 v. 293, § 33.)

Form of forfeiture of a recognizance.

August 15, 19—. The within named E F failed to appear at any time as he was bound to do by the conditions of this his recognizance, and the same became and was forfeited. A B, Justice of the Peace.

This forfeiture should be written on the back of the recognizance and a minute made of it upon the docket. The recognizance and transcript should then be returned to the court.

Sec. 13510. Proceedings when accused pleads guilty of misdemeanor.

When a person charged with a misdemeanor is brought before a magistrate on complaint of the party injured and pleads guilty thereto, such

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magistrate shall sentence him to such punishment as he may deem proper according to law, and order the payment of costs. If the complaint is not made by the party injured, and the accused pleads guilty, the magistrate shall require the accused to enter into a recognizance to appear at the proper court as is provided when there is no plea of guilty. (R. S. § 7146; 86 v. 171; 66 v. 293, § 34.)

Objections to the complaint.—After the accused is brought before the magistrate, he may object to being required to answer the complaint, for the reason of its insufficiency, or for some other matter that would be a good cause for a motion to quash, or a plea in abatement, or a demurrer to an indictment. If the objections to the complaint are not sustained, the cause will proceed. If the objections are sustained, if the officer having him in custody has reason to believe that the accused has committed a felony, it will be the duty of such officer to still hold him in custody until a sufficient complaint can be made, and a legal warrant thereon issued, or, in such case, if the accused has been released on recognizance, it will be the duty of the officer to immediately rearrest and detain him in like manner. And in every case where the complaint itself is held insufficient, a new one may immediately be prepared, a new warrant issued and the defendant rearrested thereon.

Plea of guilty.—When no such objection as above mentioned is made to the affidavit of complaint, or, if made, when the same is disposed of, then, if the charge is for a misdemeanor only, and made on complaint of the party injured, the next thing in order is to admit the accused to plead guilty, if he is disposed so to do. If he does this, the magistrate should immediately enter the plea upon his docket, and proceed to consider the circumstances of the case, whether in mitigation or aggravation of the offense, and, for this purpose, if the statement of the prosecution and those of the accused differ in the matters of fact, he may swear and examine under oath the complainant and other witnesses. And when satisfied in regard to the facts of the case, he may either sentence the accused to such fine or imprisonment, or both, as he thinks right, within the limitations of the statute, or require him to enter into recognizance, in a proper sum, for his appearance in court. The former should be the course pursued, unless there are good reasons to the contrary, as it is the most speedy way of concluding the case. If the magistrate passes sentence upon the accused, he should issue execution or mittimus, or both, if need be, so as to collect the fine and costs, and carry fully into effect his judgment in the case.

As to the execution of sentence for a misdemeanor, see §§ 13716-13719.

Imprisonment in workhouse.—See §§ 4128 and 12377 as to when accused is to be sentenced to imprisonment in the workhouse, instead of in the county jail.

An examining magistrate is not authorized to pass sentence upon the accused on his plea of guilty of a misdemeanor, except when the complaint is made by the party injured. By "the party injured," as that phrase is used in § 7146 of the Revised Statutes, is meant the person who suffers some particular injury from the commission of the misdemeanor, as distinguished from that which results to the public, or local community where it was committed. Hanaghan v. State, 51 O. S. 24.

Jurisdiction.—The introduction of coloring matter into oleomargarine is the adulteration of an article of food punishable by law, and of such offense a justice of the peace has jurisdiction. State v. Ruedy, 57 O. S. 224.

The sale of milk containing 10.61 per cent. of solids, and no more, is punishable under the act of April 10, 1889, to regulate the sale of milk, and the affidavit need not allege that milk is an article of human food. State v. Smith, 69 O. S. 196.

Unless such affidavit charges the particular sale to be a second or subsequent offense, imprisonment can not be imposed as a part of the punishment, and a justice of the peace with whom the affidavit is filed has jurisdiction to try the accused without the intervention of a jury. Inwood v. The State, 42 Ohio St. 186; approved and followed, State v. Smith, 69 O. S. 196.

Mandamus will lie to compel the exercise of such jurisdiction. In re Turner, 5 Ohio 542; State, ex rel., v. McCarty, Judge, 52 Ohio St. 363; approved and followed, State v. Smith, 69 O. S. 196.

A statute, which authorizes a penalty by fine only, upon a summary conviction under a police regulation or of an immoral practice prohibited by law, although imprisonment, as a means of enforcing the payment of the fine is authorized, is

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not in conflict with either § 5 or § 10 of Art. I of the constitution, on the ground that no provision is made for a trial by jury in such cases. Inwood v. State, 42 O. S. 186.

By force of G. C. § 4528, a mayor of a city in which there is no police court has final jurisdiction to hear and determine any prosecution for a misdemeanor where the accused is not entitled to a trial by jury, and it is not the mayor's duty, in such case, to require the accused to enter into recognizance to appear in a higher court, although the complaint is not by the party injured. State v. Borham, 72 O. S. 358.

Where a defendant pleads guilty to a charge of assault and battery relying in good faith and with reasonable cause upon a statement of his counsel that he would be given the minimum penalty, and where the court in ignorance of any such arrangement gave the maximum penalty, the judgment of the magistrate will be set aside. Backenstoe v. State, 2 N. P. (N.S.) 178, 14 O. D. 580.

The entering of a plea of guilty is a waiver of a trial by jury. A mayor having complete jurisdiction in cases of misdemeanor, a plea of guilty entered before him is to be given the same effect as in the courts of higher jurisdiction. Hillier v. State, 5 C. C. (N.S.) 245, 16 O. C. D. 777.

A justice can not impose a fine or imprisonment unless the defendant has pleaded guilty. McCann, Ex parte, 3 Dec. Rep. 38, 2 Gaz. 219.

Upon reversal by the common pleas court of the judgment of a justice of the peace in a criminal case for error in the sentence alone, and remand for resentence, the justice has authority to resentence notwithstanding the time has elapsed, after the trial, within which judgment must be rendered. Derby v. State, 24 C.-C. 304 (6 N. S. 91) (overruled in part, Yocheim v. State, 21 O. C. D. 430).

Where, from the copy of the commitment attached to a petition for a writ of habeas corpus, it appears that the person alleged to have been restrained of his liberty is in the custody of an officer by virtue of the judgment of a mayor of a city having jurisdiction to render such judgment, and it further appears that sentence was pronounced upon a plea of guilty by the accused, the question whether or not such plea was falsely entered by the mayor upon his docket is not a proper subject of inquiry in the habeas corpus proceeding. State, ex rel., v. DeMuth, 96 O. S. 519.

By force of section 4530, General Code, the mayor of a city not having a police court, has jurisdiction to pronounce sentence where the accused charged with a misdemeanor enters a plea of guilty, although imprisonment is a part of the punishment and the complaint is not made by the party injured. State, ex rel., v. DeMuth, 96 O. S. 519.

The mayor of a municipality has final jurisdiction to hear and determine prosecutions for misdemeanors, notwithstanding the right to a trial by jury, if, before the commencement of the trial, the accused waives a jury trial. A waiver of a jury trial in the prosecution of a misdemeanor before a mayor need not be in writing and a plea of guilty entered by the defendant in such prosecution amounts to such waiver. DeMuth v. State, ex rel., 7 O. A. R. 245.

Error.—A conviction for a misdemeanor before a mayor over which he has final jurisdiction may be reviewed by a proceeding in error on the ground that the conviction is against the weight of the evidence. Koch v. State, 73 O. S. 131.

Form of mittimus on plea of guilty.

The State of Ohio, ——— county, ss.

To the keeper of the jail in the county aforesaid (or, to the superintendent and directors of the workhouse of the city of ———), greeting:

Whereas, E F has been arrested on the oath of ———, for (here describe the offense in such way as to show that the complainant is the party injured), committed within said county; and the said E F, having been afterward brought before me, a justice of the peace of said county, to answer the said charge, and having pleaded guilty thereto, and having been sentenced by me to be imprisoned in the jail of said county (or, the workhouse of said city of ———), for the term of ——— days, and to pay a fine of ——— dollars, and also ——— dollars and ——— cents, for the costs therein taxed, and to be imprisoned in the jail of said county (or, the workhouse of the city of ———), until said fine and costs are paid, or secured to be paid, or until he is otherwise discharged according to law.

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Therefore in the name of the state of Ohio, I command you to receive the said ——— into your custody, in the jail of the county aforesaid, there to remain until discharged by due course of law.

Given under my hand, this ——— day of ———, A. D. 19—.

———, Justice of the Peace.

Form of execution for fine and costs.

The State of Ohio, ——— county, ss.

To any constable of said county, greeting:

Whereas, on the ——— day of ———, A. D. 19—, the state of Ohio obtained a judgment against ———, before me, a justice of the peace for said county, for the sum of ——— dollars and ——— cents, being a fine for ———, and also recovered the sum of ——— dollars and ——— cents, the costs taxed against the said ——— therein.

You are, therefore, commanded to make said fine and costs, and costs that may accrue, by levy upon the goods and chattels of the said ———, and, for the want of sufficient goods and chattels to make said fine and costs upon the body of the said ———, and if he shall have fled, that you pursue after and arrest him in any county of the state, and him commit to the jail of the county of ——— (or, the workhouse of the city of ———), there to remain until said fine and costs are paid, or secured to be paid, or he be otherwise discharged according to law.

You will make due return of this execution and a certificate thereon showing the manner in which you have executed the same, within thirty days from the time of your receipt hereof.

Given under my hand, this ——— day of ———, A. D. 19—.

———, Justice of the Peace.

Return of execution when defendant is committed.

Received this writ ———, 19—.

Sufficient goods and chattels of the within named E F can not be found to satisfy the fine and costs within mentioned, and, for want thereof, I delivered a copy of this writ to the said E F, and arrested and delivered him to the keeper of the jail of ——— county (or, to the superintendent and directors of the workhouse of the city of ———), with whom I left a certified copy of this writ and return.

Fees, $———. J. W, Constable.

A copy of the above return should be indorsed on the copy of the writ left, as well as on the original returned to the magistrate.

Sec. 13511. Proceedings when there is no plea of guilty.

When the accused is brought before the magistrate and there is no plea of guilty, he shall inquire into the complaint in the presence of such accused. If it appear that an offense has been committed and that there is probable cause to believe the accused guilty, he shall order him to enter into a recognizance, with good and sufficient surety, in such amount as he deems reasonable, for his appearance at the proper time and before the proper court; otherwise he shall discharge him from custody. If the offense charged is a misdemeanor and the accused, in a writing subscribed by him and filed before or during the examination, waive a jury and submit to be tried by the magistrate, he may render final judgment. (R. S. § 7147; 66 v. 293, § 35; 82 v. 149; 92 v. 98; 95 v. 529.)

Waiver of jury.—A plea of guilty of such offense, though filed in writing with the magistrate, is not a waiver by the accused of his right to a trial by jury,

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and submission to be tried by the magistrate, within the purview of § 7147 of the Revised Statutes, and in such case, unless the complaint was filed by the party injured, it is the duty of the magistrate to recognize the accused to the proper court. Hanaghan v. State, 51 O. S. 25.

In a prosecution under Revised Statutes, § 3718a, it is not necessary that the accused should waive a trial by jury in writing to give the magistrate jurisdiction to proceed to final judgment in the case without a jury. Sections 7147 and 3718a, of Revised Statutes, are not in pari materia. Martindale v. State, 2 C. C. 2, 1 O. C. D. 328.

A complaint that affiant "has good reason to believe and does verily believe" that the accused did on certain dates commit the offenses charged, is insufficient, in that it does not comply with the fourth amendment to the constitution of the United States, which provides that no warrant shall issue, but upon probable cause supported by oath or affirmation. United States v. Carter, 5 O. F. D. 592, 14 Bull. 191.

A person brought before a justice, charged with an offense, may, notwithstanding he pleads guilty, waive an examination of witnesses and submit to be bound over, and it is error to quash information on the ground that the justice has failed to inquire into the truth of the complaint. State v. Ritty, 23 O. S. 562; Hedges v. State, 18 O. S. 420.

The constitutional right of trial by jury is not infringed when the option is given to the accused to have the issue tried by the court or the jury, and he submits the cause to the court. Dillingham v. State, 5 O. S. 280.

By force of G. C. § 4528, a mayor of a city in which there is no police court, has final jurisdiction to hear and determine any prosecution for a misdemeanor where the accused is not entitled to a trial by jury, and it is not the mayor's duty, in such case, to require the accused to enter into recognizance to appear in a higher court, although the complaint is not by the party injured. State v. Borham, 72 O. S. 358.

It is illegal, unless authorized by statute, for a police officer or magistrate, to receive money in lieu of bail for the appearance of a person accused of a criminal offense. Reinhard v. City, 49 O. S. 257.

The entering of a plea of guilty before a mayor is a waiver of a trial by jury. Hillier v. State, 5 C. C. (N.S.) 245, 16 O. C. D. 777.

The testimony of the magistrate before whom the accused was brought for his preliminary examination, that he privately admitted his guilt, is competent evidence at his subsequent trial before the common pleas. Smith v. State, 15 C. C. (N.S.) 223, 24 O. C. D. 526.

A police court has the same jurisdiction in misdemeanor cases as a justice of the peace, and can not enter final judgment, without the intervention of a jury, against one charged with a misdemeanor, unless during the examination he has signed a waiver in writing of a jury in his case. In re Hildebrand, 15 C. C. (N.S.) 187, 23 O. C. D. 638 (affirming 13 N. P. (N.S.) 119).

Unless one charged with carrying concealed weapons waives trial by jury in writing, the police court is without final jurisdiction in the case. Howard v. State, 2 N. P. (N.S.) 285, 14 O. D. 483.

In a case which involves a violation of a statute or of an ordinance, the penalty for which is only a fine, a jury is not an inalienable right of the accused, and it accordingly may be refused if the statute so provides. Ames v. State, 11 N. P. (N.S.) 385, 22 O. D. 92, 56 Bull. 165.

General Code § 13031 which provides a punishment for keeping a house of ill-fame imposes imprisonment as a part of the penalty, and accordingly, if one is tried for the violation of such section, such trial should be to a jury unless a jury is waived under this section. In re Zacharow, 13 N. P. (N.S.) 119, 57 Bull. 285.

A person arrested upon a warrant charging him with embezzling seventy-seven dollars, a felony for which he was discharged in the municipal court, can not set up this discharge as a plea in bar to an indictment in the common pleas court charging him with embezzlement of the same seventy-seven dollars, for the reason that the municipal court did not have jurisdiction of the felony charge, its powers being limited to that of an examining magistrate. State v. Stiver, 17 N. P. (N.S.) 555.

Statutes providing in substance that before an accused shall be entitled to a jury in the trial of misdemeanors or petty offenses under municipal ordinances,

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where imprisonment is made a part of the penalty, he must demand the same, are not in any wise violative of the constitutional right to trial by jury. Under such statutes before error may be prosecuted to the action of the trial judge in trying the case without a jury, the record must show such demand and a refusal to grant the same. Hoffman v. State, 98 O. S. 137.

Presumption that jury trial was waived.—A police court is a court of record, and as such has jurisdiction of a prosecution for assault and battery under § 6823, Revised Statutes, defining the offense and prescribing the penalty therefor. Hence, the circuit court will presume, trial by jury being necessary unless waived, that the jury was waived unless, by a proper bill of exceptions, it appears that the accused either demanded such a trial or refused to waive the right thereof, and was not so tried.

Waiver should appear of record.—In case of a trial in the police court, such as for assault and battery, in which the accused has the right of trial by jury and waives it, the only safe and proper rule for such court is to have the fact noted upon the record.

Examination and proof.—The witnesses on the part of the state should first give their testimony, then those for the defendant, and afterward rebutting testimony on the part of the state may be offered. No depositions, however, can be read, but witnesses must testify in person.

It should be proved on the part of the state:

1. That an offense has been committed as set out in the affidavit, though it is not indispensable that the offense proved against the defendant be of the same grade as that set out.

2. It must be proved that the prisoner before the magistrate was the person who committed the offense.

3. The time that it was committed must also be proved Though, in this respect, the proof need not correspond with the time stated in the affidavit or complaint, it being sufficient to prove that it was committed any time within the limitation of the statute before commencing the prosecution.

4. It must also be proved that the offense was committed in the county stated in the complaint.

Waiving examination.—A person brought before a justice of the peace, charged with an offense, may, notwithstanding he pleads not guilty, waive an examination of witnesses to sustain the charge, and submit to be bound over without such examination. State v. Ritty, 23 O. S. 562; Hedges v. State, 18 O. S. 420.

The amount of the recognizance, where one is required, should be fixed with reference to the nature of the offense, the strength of proofs against the accused, and the amount of property that he owns. The amount ought not to be oppressive, but in all cases it should be in such amount as to insure the appearance of the defendant at court.

Capital cases.—If the crime charged against the defendant is one the punishment of which is capital, a recognizance should seldom be taken. If the circumstances of suspicion are at all strong, the accused should be committed. If he is clearly innocent, he should be discharged. But in case of a weak presumption only against him, with a possibility of a greater accumulation of evidence, it might be the duty of the magistrate to require a recognizance. (Constitution Art. I, § 9.) But even in such case, where the charge is for murder in the first degree, it may be as well, in order to avoid technicalities, to require the recognizance to be for murder in the second degree.

For form of commitment after examination, where accused is required to give bail, see § 13553.

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Form of commitment in capital case where the proof is evident or the presumption great.

The State of Ohio, ——— County, ss.

To the keeper of the jail of the county aforesaid, greeting:

Whereas, E F, late of said county, has been arrested on a complaint in writing, signed and sworn to by C D, for purposely and of his deliberate and premeditated malice killing and murdering one M N by (here set out briefly the manner of committing the crime, as, by shooting the said M N, or other means, stating it according to the fact), on or about the ——— day of ———, A. D. 19—, at the county of ——— aforesaid, and has been examined by me, A B, one of the justices of the peace in and for said county, on such charge, and has been ordered, adjudged and required by me to be safely kept and confined in the jail of said county, so that his body be had before the court of common pleas of said county on the first day of the term thereof next to be holden, and from day to day, to answer such charge, the proof thereof being evident; therefore, in the name of the State of Ohio, I command you to receive the said E F into your custody in the jail of the county aforesaid, there to remain until he be discharged or dealt with by due course of law.

Given under my hand and seal, this ——— day of ———, A. D. 19—.

[SEAL.] A B, J. P.

Form for the return of a mittimus.

August 12, 19—. I committed the within named E F to the custody of the within named jailer, with whom I left a certified copy of this writ.

J W, Constable.

Trial by magistrate when jury waived.—The waiver of a jury must be in writing, and signed by the accused. It should be filed and preserved by the magistrate.

Form of waiver of a jury.

State of Ohio
v. } Complaint by C D, for ———.
E F.

I waive a jury, and submit to be tried by A B (naming the magistrate before whom the accused has been brought for examination). E F.

Conduct of trial.—On the hearing, the order of trial laid down in § 13675, omitting so much as relates to the instructions and charge to the jury, should be observed. Before convicting the accused, the magistrate should be satisfied, beyond all reasonable doubt:

1. That the offense, as set forth in the complaint, has been committed. As to a variance between the statements in the complaint and the evidence offered in proof thereof, see § 13582.

2. That the prisoner was the person who committed the offense.

3. That the offense was committed at some time within the limitation mentioned in Title I.

4. That the offense was committed in the county stated in the complaint.

The accused has the right to except to the opinion of the magistrate upon any question of law arising during the trial. (§ 13426.)

As to proceedings in error to review the judgment of the magistrate, see § 13751.

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Form of mittimus on trial by magistrate.

The State of Ohio, ——— county, ss.

To the keeper of the jail in the county aforesaid (or, the superintendent and directors of the workhouse of the city of ———), greeting:

Whereas, E F has been arrested on the oath of ———, for ——— committed within said county; and the said E F, having been afterward brought before me, a justice of the peace for said county, to answer to said charge, and having pleaded not guilty thereto, and having, in a writing subscribed by him before me and duly filed, waived a jury trial and submitted to be tried by me, was tried and found guilty by me; and having been sentenced by me to be imprisoned in the jail of said county (or, in the workhouse of the city of ———), for the term of ——— days, and to pay a fine of ——— dollars, and also ——— dollars and ——— cents, the costs therein taxed, and to be imprisoned in the jail of said county (or, in the workhouse of the city of ———), until said fine and costs are paid, or secured to be paid, or until he is otherwise discharged according to law.

Therefore, in the name of the State of Ohio, I command you to receive the said E F into your custody, in the jail of the county aforesaid, there to remain until discharged by due course of law.

Given under my hand, this ——— day of ———, A. D. 19—.

——— ———, Justice of the Peace.

Sec. 13512. When witnesses may be examined separately.

The magistrate, upon request or if there is good cause therefor, shall order the witnesses on both sides to be examined separately and the witnesses for the accused be kept separate from those against him during such examination. (R. S. § 7148; 66 v. 293, § 36.)

Where the witnesses in a cause have been ordered by the court, at the request of a party, to withdraw, and one of them remains, in violation of the order, and hears the testimony of the other witnesses, it rests in the discretion of the court whether he shall afterward be permitted to testify in the case. Laughlin v. State, 18 O. S. 99.

While the court is vested with discretion to refuse or permit the examination of a witness who has remained in court, by procurement or connivance of the party calling him, in violation of an order for the separation of witnesses, it is vested with no such discretion to prevent such examination where there has been no such procurement or connivance; but the order is to be enforced by the officers in attendance, and disobedience of it punished by the court as for contempt. Dickson v. State, 39 O. S. 73.

Sec. 13513. When prisoner to be discharged.

If, upon the entire examination, it appear that no offense has been committed or that there is not probable cause for holding the prisoner to answer the offense, he shall be discharged. (R. S. § 7149; 66 v. 293, § 37.)

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Sec. 13514. When witness shall be recognized to appear at court.

When the accused enters into a recognizance or is committed in default thereof, the magistrate shall require such witnesses against the prisoner as he deems necessary to enter into recognizances to appear and testify before the proper court, at the proper time, and not depart from such court without leave. (R. S. § 7150; 66 v. 293, § 38.)

When witnesses are recognized to appear at court, it is the duty of the magistrate taking the recognizance to indorse on his transcript the number of miles for which each will be entitled to mileage. (General Code, § 3013). The amount of the recognizance of each witness should depend upon the importance of his or her testimony, the magnitude of the offense and the inducement that might be offered the witness to abscond.

Form of recognizance of witnesses without security.

State of Ohio, ——— county, ss:

Be it remembered that, on the ——— day of ———, A. D. 19—, M S (H N, and A Y) personally appeared before me, A B, one of the justices of the peace in and for the county aforesaid, and (severally) acknowledged himself (or, themselves) to owe the State of Ohio the sum of one hundred dollars, to be levied of his (or, their) goods and chattels, lands and tenements, if default be made in the condition following, to-wit:

The condition of this recognizance is such that if the above bound M S (H N, and A Y) shall personally be and appear before the court of common pleas (or other court, stating it), on the first day of the term thereof next to be holden in and for the county aforesaid (or, forthwith, if it be term time), then and there to give evidence and the truth to say, on behalf of the state, touching such matters as shall then and there be inquired of him (or, them), and not to depart the court without leave, then (and as to such of the above bound as perform this condition), this recognizance shall be void, otherwise it shall be and remain in full force and virtue in law.

Taken and acknowledged before me, on the day and year first above written.

A B, Justice of the Peace,
(or, Mayor of, etc.)

The above form may be either for one witness or for any number. In order to suit it to one witness only, leave out the words in italics and those in brackets. The better way, especially when there is any apprehension that any witness will forfeit his recognizance, is to make out a separate recognizance for each one.

Sec. 13515. Recognizance of witness.

When the magistrate is satisfied that there is reason to believe that a witness will not perform the condition of his own recognizance, if the offense charged is a felony, he may order him into recognizance with sufficient surety. (R. S. § 7151; 66 v. 293, § 39.)

For form of recognizance of witness with surety, see § 13552.

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Sec. 13516. Recognizance for minor.

A person may be liable in a recognizance for a minor to appear as a witness or the magistrate may take the minor's recognizance in a sum not exceeding one hundred dollars, which shall be valid, notwithstanding the disability of minority. (R. S. § 7152; 66 v. 293, § 40.)

Sec. 13517. When witness refuses to enter into a recognizance.

If the witness ordered to enter into a recognizance refuses to comply with such order, the magistrate shall commit him to jail until he complies therewith or is discharged according to law. Such witness shall not be confined in association with prisoners charged with crime. (R. S. § 7153; 85 v. 598; 66 v. 293, § 41.)

A magistrate, under the provisions of the statute, making an examination into a complaint against a person accused of a crime which is a felony, having, for just cause, adjourned the examination for one day, and committed the accused into custody for safe-keeping, may properly order and require a necessary witness against the accused to enter into recognizance, with sufficient surety, for his appearance as a witness on the day to which the examination is adjourned, and if such witness refuse to comply with such order, has ample and full power to commit such witness into custody until he complies with the requirement or is otherwise discharged. And a constable, receiving a witness so ordered into his custody by an examining magistrate, and, in obedience to such order of commitment, detaining him for one day, is not liable to an action for false imprisonment; and a statement, by way of answer, of the facts of such order and its reasonable enforcement by the constable, is a complete defense to such an action. Fawcett *et al.* v. Linthecum, 7 C. C. 141; 3 O. C. D. 700.

Form of commitment of a witness who refuses to enter into recognizance.

State of Ohio, ——— county, ss.

To the keeper of the jail of the county aforesaid, greeting:

Whereas, E F has been arrested on the oath of C D, for (here describe the felony), and has been examined by me on such charge, and has been required by me to give bail in the sum of ——— dollars, for his appearance before the court of common pleas, on the first day of the next term thereof (or, before the probate court, on the first day of the next term thereof for the trial of criminal cases; or, forthwith, as the fact was); and whereas, being satisfied that G H, a material witness on behalf of the state against the said E F, will not perform the condition of his own recognizance, I have required the said G H to enter into a recognizance with sufficient surety, in the sum of ——— dollars, to personally be and appear before the court of common pleas, on the first day of the next term thereof (or, before the probate court, on the first day of the next term thereof for the trial of criminal cases; or, forthwith, as the fact was), then and there to give evidence, and the truth to say, on behalf of the state, touching such matters as shall then and there be required of him, and not depart the court without leave, which requisition he, the said G H, has failed to comply with; therefore, in the name of

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the state of Ohio, I command you to receive the said G H into your custody, in the jail of the county aforesaid, there to remain until he be discharged by due course of law.

Given under my hand and seal, this ——— day of ———, A. D. 19—.

A B, Justice of the Peace.

Sec. 13518. When children under sixteen years to be committed to asylums, etc.

Upon an examination before a court or magistrate, if it appears that a child under the age of sixteen years was or is unlawfully engaged or used for or in a business exhibition, vocation or purpose, such court or magistrate may commit such child to an orphan asylum or charitable or other institution, or make such other disposition thereof as lawfully may be made of vagrant, truant, disorderly, pauper or destitute children. A court or magistrate, in case of conviction of a person of a criminal offense, made so by the laws of the state, or ordinances of a municipality, shall have the same power over a child, if such conviction leaves such child without maintenance, protection or education, and the child's welfare will be thereby promoted. (R. S. § 7154; 80 v. 141; 73 v. 219, § 5.)

Sec. 13519. Docket to be kept, and transcript to be forwarded to clerk.

A magistrate shall keep a docket of criminal proceedings, as in civil cases. In cases where the defendant is held to answer, a transcript of the proceedings, including a copy of the complaint, with any recognizance taken in the case, shall be forwarded forthwith to the clerk of the court in which the prisoner is to appear. Such transcript shall contain an itemized account of the costs that have accrued. (R. S. § 7155; 66 v. 293, § 42.)

A transcript from the docket of a justice of the peace is not competent evidence, on the trial of a case, to prove facts stated therein not required by the statute to be entered on the docket. Armstrong v. State, 21 O. S. 357.

A justice of the peace must have jurisdiction in order to render a valid judgment and this must fairly appear by his record. McCurdy v. Baughman, 43 O. S. 73.

A case is pending in the common pleas court, within the meaning of the general schedule to the amendments of 1912 to the constitution of Ohio, when there is filed in that court a transcript of the criminal docket of the examining magistrate by whom the accused has been committed to the jail of the county, or recognized to appear before that court to answer the charge in the affidavit filed with such magistrate. State v. Morrow, 90 O. S. 202 (affirming 15 C. C. (N.S.) 561, 24 O. C. D. 140).

Compensation for journal entries of recognizances received from examining magistrates for parties to appear before the probate court or court of common pleas, if such entries are at all necessary, and it seems not, should be taxed in the case and not to the county. Com. v. Welliver, 12 C. C. 443, 5 O. C. D. 569.

Criminal docket.

The margin should contain an accurate bill of all costs that have accrued, and the items composing the same.

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The State of Ohio
v.
.....
———, 19—,
——— hereby acknowledge ——— responsible for the costs in this action, in case the complaint in the same shall be dismissed.
.....
.....
Security approved,
——— ———, J. P.

The State of Ohio, ——— county.

Before me, a justice of the peace in and for said county.

Complaint No. ——, made this ——— day of ———, A. D. 19—, by ———, who, being duly sworn, saith that, on or about the ——— day of ———, A. D. 19—, at the county aforesaid, ———. Complaint filed.

Warrant issued for the defendant to ———, constable of said county, who made return as follows, to-wit: ———.

Subpœna issued for the following witnesses, to-wit: ———.

Return on subpœna made as follows, to-wit: ———.

Defendant arraigned before me, the said justice, on the ——— day of———, and upon hearing said complaint pleaded "——— guilty" to the same.

Continuance required by ——— on account of ———. The case was therefore continued to ———, 19—, at ——— o'clock, — M., and the defendant required to give bail in the sum of ——— dollars, for ——— appearance as that time, before me, the said justice of the peace, and to abide the judgment of the court, and not to depart without leave.

Bail ——— given as required, and prisoner ———.

Return on mittimus, to-wit: ———.

Further continuance required, and ——— obtained, by ——— until the ——— day of ———, 19—, on account of ———, and defendant ———, as in first mentioned continuance ———.

Trial had on the ——— day of ———, 19—, the parties being present. Witnesses sworn and examined on behalf of the state, to-wit: ———; and for defendant, ———.

It is thereupon, on said day, by me, the said justice of the peace, adjudged and ordered that the said defendant ———.

Recognizance ——— given as required and defendant ———.

Return on mittimus, to-wit: "———, 19—. By virtue of this writ I have this day committed the body of the within named ——— to the jail of ——— county, Ohio, and have left with the jailer thereof a certified copy of this writ. ———, Constable."

I have bound, by their own recognizance, to appear and testify before said court the following witnesses, to-wit: ———. ——— ———.

When there is a plea of guilty to a complaint for a misdemeanor.

(Give date and preliminary proceedings.) And said E F being now brought before me to answer said complaint, pleaded guilty; and thereupon he is ordered and required by me to enter into a recognizance for his appearance in court, according to law, to answer said complaint (etc., the same as upon examination, and, in default of recognizance, commitment may be made).

(Or, if it be a complaint by the party injured, the magistrate may sentence the accused, and render judgment, thus:)—and thereupon the said E F is ordered, adjudged, and sentenced by me to be imprisoned in the workhouse of the city of ——— (or, in the jail of said county), for ——— days, and to pay a fine to the

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State of Ohio, in the sum of ——— dollars and ——— cents, and to pay the costs of this prosecution, taxed at ——— dollars and ——— cents, and that the said E F stand committed, and be imprisoned in the jail of this county (or, the workhouse of said city of ———) until said fine and costs be paid, or he be otherwise discharged, according to law.

And, thereupon, I issued a mittimus for the commitment of the defendant, and an execution for said fine and costs (if an execution is issued) and delivered said writs to J W, constable.

When the accused waives a jury and submits to be tried by the magistrate.

And the said E F, being now brought before me to answer said complaint, pleaded not guilty, and, in a writing subscribed by him before me and duly filed, waived a jury and submitted to be tried for the offense charged in said complaint by me. And, having heard the evidence, I find the said E F † not guilty.

(Or, if the accused is convicted, follow to the †, and then add:)—guilty of the offense charged against him in said complaint.

(If the offense is one mentioned in § 13691, add:)—and assess the value of the property stolen (or, embezzled; or, falsely obtained) at ——— dollars. And, thereupon, the said E F is ordered, adjudged and sentenced by me to be imprisoned in the workhouse of the city of ——— (or, in the jail of said county), to be kept at hard labor for ——— days, and to pay a fine to the State of Ohio in the sum of ——— dollars, and the costs of this prosecution, taxed at ——— dollars, and that the said E F stand committed and be imprisoned in the jail of this county (or, the workhouse of the city of ———), until said fine and costs be paid, or he be otherwise discharged according to law.

And, thereupon, I issued a mittimus for the commitment of the defendant, and (if an execution is issued) an execution for said fine and costs, and delivered said writs to J W, constable.

When recognizance is forfeited.

January 7, 19—. The defendant failed to appear at any time on the said day, as by his recognizance he was bound to do, and the same became and was forfeited.

(Or, if defendant appeared and escaped without abiding the order of the magistrate, say:)

January 7, 19—, 10 o'clock, A. M. Defendant appeared and the examination in the cause was commenced (or, had, as the case may be, giving the particular stage to which the proceeding had progressed), and thereupon, the said E F departed without leave, and failed to abide my order herein, as by his recognizance he was bound to do, and the same became and was forfeited.

After such forfeiture, the accused may still be arrested and dealt with, if he can be found.

Of the forms and procedure for mayors and police judges.

The procedure given in this chapter will be the same for mayors and police judges as for justices of the peace, and the forms given for justices, with such slight alterations as will readily suggest themselves to the mind of the officer, will be as well adapted to the use of mayors and police judges as that of justices. The mayor

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or police judge, in alluding to himself as the authority, in a writ or affidavit, will say:

"One of the magistrates in and for said county, to-wit, the mayor (or, police judge) of the village (or, city) of ———, in said county."

FUGITIVES FROM OTHER STATES.

Sec. 13520. Arrest of fugitives from other states.

When an affidavit is filed before a judge of a common pleas, probate or police court or a justice of the peace, setting forth that a person charged with the commission of an offense against the laws of another state or territory of the United States, which, if committed in this state would, by the laws thereof, have been a crime, is, at the time of filing such affidavit, within the county where it is filed, such judge or justice of the peace shall issue a warrant directed to the sheriff or any constable of the county, commanding him forthwith to arrest and bring before him the person so charged. (R. S. § 7156; 66 v. 319, § 211; S. & S. 608; S. & C. 1197.)

For form of warrant, see § 13501.

The provisions of the constitution of the United States and of the acts of congress provide for the extradition of persons who are actually, and not merely constructively, present in the demanding state when they commit the acts charged against them; and in a proceeding on habeas corpus for discharge from arrest on a warrant of extradition parol evidence is admissible to show that there had been no actual presence of the accused in the demanding state. Wilcox v. Nolze, 34 O. S. 520.

After full argument and examination of numerous authorities, the court holds that the governor has the right to demand the surrender of a fugitive from this state, charged with a misdemeanor; and that § 95, relating to the matter of interstate extradition, does not in any way limit the authority and power vested in the executive by the federal constitution and the laws of congress. Hudson v. State, 20 C. C. 660, 10 O. C. D. 812.

Good faith on the part of those asking extradition is to be presumed, but where the evidence shows that the purpose of the extradition is to procure the prisoner in order that he may be killed in the exercise of individual vengeance, then the proceeding violates the constitutional purpose and the judge is not required to aid in removing him. In re Hampton, 1 N. P. 181, 2 O. D. 579.

Whether a prisoner in extradition be a fugitive from justice is a question of fact for the determination of the governor and the judge in the habeas corpus proceedings. In re Hampton, 1 N. P. 181, 2 O. D. 579.

The affidavit charging the person demanded in extradition with crime must be certified as authentic by the governor making the requisition; and if it appears that such affidavit is not thus certified the prisoner is entitled to a discharge on a writ of habeas corpus. In re Hampton, 1 N. P. 181, 2 O. D. 579.

Affidavit for warrant for the arrest of a fugitive from justice.

State of Ohio, ——— county, ss.

Before me, A B, personally came C D, who, being duly sworn according to law, deposes and says that E F is a fugitive from justice from the state of ———, where he stands charged with a crime committed in that state, viz. (here describe the offense committed), which said acts are by the laws of said state of ——— an offense, and which said acts, if they had been committed in the State of Ohio, would, by the laws thereof, have been a crime; that the said E F has fled from said state of ———, and has taken refuge in the State of Ohio, and is now within the said county of ———. C. D.

Sworn to and subscribed before me, this ——— day of ———, 19—.

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Sec. 13521. May be committed to jail.

When a person is arrested in pursuance of the next preceding sec- peace, under the next preceding section, such judge or justice shall hear and examine such charge, and, upon proof adjudged by him to be sufficient, commit such person to the jail of the county in which such examination is had, or cause him to be delivered to a suitable person to be removed before such judge or justice of the proper county in which to take such examination, who shall take it and proceed as if the warrant had been issued by him. (R. S. § 7157; 66 v. 319, § 212; S. & C. 1197; S. & S. 609.)

Order committing a prisoner to await requisition.

In the matter of E. F. } Charge, being a fugitive from justice.

The said E F having been brought this day before me under a warrant issued by me (or, by ———, naming the magistrate or judge issuing the warrant), charging him, the said E F, with having committed the crime of (here describe the offense) in the state of ———, and with being a fugitive from justice from said state of ———, † and said charge having been heard and examined by me, it is ordered by me that the said E F be committed to the jail of said county for the period of ——— days (name a reasonable time for the purpose of procuring a requisition), unless he be discharged or surrendered up, in the meantime, by due course of law.

Order to take prisoner before judge or justice for examination.

(Follow the preceding form to †, and then add:)—it is ordered by me that the said E F be delivered to (naming the magistrate), and that the said (naming the officer) take the said E F forthwith before (naming the justice or judge), to be examined on said charge.

Form of commitment of prisoner to await a requisition.

State of Ohio, ——— county.

To the keeper of the jail of the county aforesaid, greeting:

Whereas, E F has been arrested on a complaint in writing, signed and sworn to by C D, that the said E F is a fugitive from justice from the state of ———, where he stands charged with a crime committed in that state, viz. (here describe the offense); that the said acts are, by the laws of said state of ———, an offense, and that said acts, if they had been committed in the State of Ohio, would, by the laws thereof, have been a crime; that the said E F has fled from said state of ———, and has taken refuge in said county and State of Ohio; and, whereas, the said E F has been examined by me on said charge, and has been ordered by me to stand committed to the jail of said county for the period of ——— days, unless he be discharged or surrendered up, in the meantime, by due course of law. Therefore, in the name of the State of Ohio, I command you to receive the said E F into your custody, in the jail of the county aforesaid, there to be kept for said term of ——— days, or until he be discharged or surrendered up by due course of law.

Given under my hand and seal, this ——— day of ———.

A B, Justice of the Peace.

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Sec. 13522. Notice to be given by judge or magistrate.

When a person is committed to jail by a judge or justice of the peace, under the next preceding section, such judge or justice shall forthwith give notice, by letter or otherwise, to the sheriff of the county in which such offense was committed, or to the person injured by such offense. A person so committed shall not be detained in jail longer than to allow a reasonable time to the persons receiving such notice to apply for and obtain the proper requisition for such person. (R. S. § 7158; 66 v. 319, § 213; S. & C. 1197; S. & S. 609.)

BAIL.

Sec. 13523. Sureties on recognizance required to qualify.

A court or officer required to take or accept a recognizance or to approve the sureties on a recognizance in a criminal case may require such sureties to make affidavit or be examined orally under oath as to their qualifications. Such court or officer may take such affidavit or administer such oath. (R. S. § 7159; 71 v. 27, § 1.)

Sec. 13524. Qualifications of sureties.

One surety in such recognizance must be a resident of the county in which the prosecution is pending, and the sureties must be worth double the sum to be secured and have property in this state liable to execution equal to such sum. When two or more sureties are offered to such recognizance, they must have in the aggregate the qualifications prescribed in this section. (R. S. § 7160; 71 v. 27, § 2.)

Sec. 13525. Renewal or change in recognizance.

In all cases in which an indictment or presentment is returned into the court of common pleas, such court shall require the accused to enter into a recognizance in such amount as the court may fix. It shall not be necessary to renew such recognizance at the end of the term, or at any other time, except upon motion made to the court, but the court, upon its own motion, may renew, or for proper cause shown, increase or decrease such recognizance. Such recognizance, when so given, shall be conditioned that the defendant abide the order and judgment of the court and appear from day to day and not depart without leave until such case is finally disposed of. It shall not be necessary, when said recognizance is so executed, for the accused to give another recognizance pending a prosecution for error, but such recognizance shall continue and be in full force throughout the prosecution in error. The court in which such error is prosecuted, for good cause shown, may increase or decrease such recognizance or remand the accused to the sheriff of the county in which such indictment or presentment was returned. When two or more indictments or presentments are returned

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against the same person at the same term, the recognizance given may be made to include all offenses charged therein. (99 v. 356, § 7160a.)

Previous to the act of May 9, 1908 (99 O. L. 356), there could be no recovery against the sureties on a recognizance in a criminal case, for the appearance of the prisoner at the next term of court, unless at said term the prisoner was called, failed to appear and the recognizance was forfeited. State, ex rel., v. Liggotta, 17 C. C. (N.S.) 584.

Sec. 13526. Recognizance, its conditions, etc.

If the offense for which the accused is held to answer is bailable and he offers sufficient bail, a recognizance shall be taken for his appearance to answer the charge before the court of common pleas, on the first day of the next term thereof, or before the probate court, if it has jurisdiction thereof, on the first day of the next term thereof for the trial of criminal cases, and that he will not depart without leave or, if the court, before which he is held to appear, is at the time in session, the recognizance shall require the accused to appear forthwith before such court. A recognizance requiring the accused to appear at the next term of such court shall not be invalid by the fact that the court is in session. (R. S. § 7161; 92 v. 99; 82 v. 149; 66 v. 294, §§ 43, 44.)

Article I, § 9, of the constitution provides "All persons shall be bailable by sufficient sureties, except for capital offenses where the proof is evident, or the presumption great. Excessive bail shall not be required."

An indictment for murder in the first degree raises the presumption required by the constitution to justify the refusal of bail. Kendle v. Tarbell, 24 O. S. 196.

If a justice of the peace has been imposed on to receive insufficient bail, he may arrest again, and hold to better bail. Carothers v. Scott & Watt, Tappan, 227.

A recognizance is invalid unless it contain all the essential parts both of the obligation and the condition; and none of the material parts of either can be supplied by oral testimony. State v. Crippen, 1 O. S. 399.

Where a party, imprisoned by virtue of a mittimus issued by a justice, is brought before a probate judge on habeas corpus, and enters into a recognizance for his appearance in the court of common pleas, such recognizance is not invalidated by showing that the justice did not inquire into the case "by examination of witnesses," but that the defendant waived the examination. Hedges v. State, 18 O. S. 420.

In an action on a recognizance entered into before a justice of the peace for the appearance of a party in court, it is no defense that an indictment against him, for the same offense, was pending in said court, without showing that he had been arrested upon such indictment. Gage v. State, 29 O. S. 6.

A qualification in a recognizance, that it should only be valid in case the accused was then legally imprisoned on the charge, can have no operative effect, and must be treated as surplusage. State v. Welkman, 3 O. 14.

In an action on such recognizance, a plea merely alleging that at the time the recognizance was entered into the accused was not legally imprisoned on the charge, is bad. Ib.

In murder, after a disagreement of the jury, if the evidence exhibited to the court or judge be of so weak a character that it would not sustain a verdict of guilty against a motion for a new trial, the court will admit to bail. State v. Summons, 19 O. 139.

Parol evidence is not admissible, in an action on a recognizance forfeited in the court of common pleas, to contradict the record of forfeiture. Calvin v. State, 12 O. S. 67.

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A recognizance omitting the word next, but strictly pursuing the statute in all other respects, will not be deemed invalid for such omission. Proseck v. State, 38 O. S. 606.

As to when the obligation of the recognizance is sufficient, where statute not strictly followed. Ib.

If the accused does not appear when called, at any time during the appearance term mentioned in the condition of the recognizance, he fails to comply with the condition of the recognizance and the court will declare his recognizance forfeited. Swank v. State, 3 O. S. 429.

A forfeiture may be declared after the continuance of the case, provided it is done at the same term. Swank v. State, 3 O. S. 429.

Where the prisoner is admitted to bail after a verdict of guilty and before sentence, and fails to appear for sentence, the sureties on his recognizance are liable. Hampton v. State, 42 O. S. 401.

A recognizance conditioned for appearance on the first day of a term, is forfeited if the accused fails to appear when called on the fifth day thereof. Bishop v. State, 16 O. S. 419.

Bail may be defined as a delivery of a person to his sureties, upon their giving, together with himself, sufficient security for his appearance; he being supposed to continue in their friendly custody, instead of going to jail. Reinhard v. City, 49 O. S. 257.

For circumstances under which money accepted in lieu of bail can be recovered after being declared forfeited, see Reinhard v. City, 49 O. S. 257.

Where a justice committed a person charged with counterfeiting, the court of common pleas may recognize the accused for his appearance from day to day, without a habeas corpus and without inquiry into the circumstances. State v. Dawson, 6 O. 250.

A recognizance taken January 21, 1868, is not invalid though conditioned for the appearance of the prisoner at the next term of court beginning February 10, 1868, though a term of court began October 14, 1867, and did not adjourn until January 27, 1868. Millikin v. State, 21 O. S. 635.

After a verdict of guilty and before sentence the court may in its discretion take a recognizance for the appearance of the prisoner to abide the judgment of the court, except in "capital cases where the proof is evident or the presumption great." Hampton v. State, 42 O. S. 401; State v. Granvelle, 9 Dec. Rep. 626, 15 Bull. 419.

Although the statutes make no provision for a hearing, by one charged in an indictment with murder in the first degree, for the purpose of admitting him to bail, the court may hear testimony and admit to bail. Martin v. State, 17 C. C. 406, 9 O. C. D. 621.

Under the constitutional provision that "all persons shall be bailable by sufficient sureties, except for capital offenses where the proof is evident or the presumption great," an application for bail by one who is under indictment for murder in the first degree is addressed to the sound legal discretion of the court with the presumption against the admission to bail, and the burden upon the applicant of showing that the proof is not evident or the presumption of great guilt. State v. Woolard, 12 N. P. (N.S.) 395, 22 O. D. 652.

If the evidence exhibited on the hearing of the application for bail in a case of murder in the first degree, after the disagreement and discharge of the jury, be of so weak a character that it would not sustain a verdict of guilty against a motion for a new trial, the court will admit to bail. State v. Smith, 16 N. P. (N.S.) 385, 24 O. D. 456, 59 Bull. 52.

For form of recognizance of accused, see § 13552.

Sec. 13527. Prisoner may be held to answer for a higher crime than charged.

If, on the examination, the magistrate finds that the accused has committed an offense of a higher grade than that charged, he may be held to answer therefor. (R. S. § 7162; 66 v. 294, § 45.)

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Sec. 13528. Proceedings when prisoner fails to give bail.

If the offense is not bailable or sufficient bail is not offered, the accused shall be committed to the jail of the county in which he is to be tried, until he is discharged by law. (R. S. § 7163; 66 v. 294, § 46.)

Sec. 13529. Duties of clerk on receipt of recognizance and record.

When a transcript or recognizance is received by the clerk, he shall enter the case upon the appearance docket of the court with the date of the filing of such transcript or recognizance, the date and amount of the recognizance, the names of the sureties and the costs. Such recognizance shall be considered thereupon as of record in such court, and proceeded on by process issuing therefrom, in a like manner as if it had been entered into before such court. When a court having cognizance of an offense takes a recognizance, it shall be a sufficient record thereof, to enter upon the journal of such court the title of the case, the crime charged, the names of the sureties, the amount of such recognizance and the time therein required for the appearance of the accused. In making the complete record, when required to be made, recognizances, whether returned to or taken in such court, shall be recorded in full if required by the prosecuting attorney or the accused. (R. S. § 7164; 69 v. 17, § 47; S. & C. 1193.)

A mere memorandum of the clerk of the court, on a loose sheet of paper, setting forth that a recognizance had been entered into in open court by the parties thereto, but not setting out all the material parts, is invalid as a recognizance. State v. Crippen, 1 O. S. 399.

A recognizance taken before a justice of the peace becomes, when entered in court, an obligation of record, and imports absolute verity. State v. Daily, 14 O. 91.

The provisions in the act of March 8, 1831 (3 Chase, 1675, § 8), that a recognizance minuted on the journal "shall be considered as of record in such court, and proceeded on by process issuing out of said court, in the same manner as if such recognizance had been entered into before said court," did not require that an action of debt on such recognizance should be commenced by process issuing out of said court. State v. West, 3 O. S. 509.

Where a person under commitment for crime, appears before the court of common pleas without process, he may be admitted to bail, although the charge is not laid formally before the court. State v. Dawson, 6 O. 251. The recognizance not void for omitting to state the offense with which the accused is charged. Ib.

Under the act of March 12, 1853 (2 S. & C. 1193), a failure of the clerk of common pleas court to enter the memorandum of the recognizance in the minute book of the court is not fatal to the right of recovery upon the recognizance. State v. Williams, 14 O. S. 140.

The record of a conviction for crime must show that the defendant was arraigned on the indictment. Hanson v. State, 43 O. S. 376.

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When, under the practice act of 1831, a recognizance returned to the court of common pleas became a matter of record. Sargeant v. State, 16 O. 267.

Until it became a matter of record, no suit could be maintained on it; nor was it of any validity at common law. *Ib.*

Compensation for journal entries of recognizances received from examining magistrates for parties to appear before the probate court or court of common pleas, if such entries are at all necessary, and it seems not, should be taxed in the case and not to the county. Com. v. Welliver, 12 C. C. 443; 5 O. C. D. 569.

Entry of record of recognizance—Recognizance taken by the court.

(Title.) Indictment for ———.

This day came the defendant, and with J H as his surety, entered into recognizance (or, omit the surety, and say, entered into his own recognizance) before the court in the sum of ——— dollars, conditioned for his appearance at the ——— term of this court to answer said charge.

Entry—When prosecuting attorney or accused require recognizance to be recorded in full.

(Title.) Indictment for ———.

This day came the defendant, and with J H as his surety, entered into recognizance in the words and figures following, to-wit (copy recognizance in full).

Sec. 13530. Examining court to be held by probate judge, when and how.

When a person is committed to jail charged with the commission of an offense, and wishes to be discharged therefrom, the sheriff or jailer shall forthwith give to the probate judge, clerk and prosecuting attorney of the proper county, at least three days' notice of the time of holding an examining court, to attend, according to such notice, at the courthouse. The judge, having examined the witnesses, including the accused, if he request an examination, shall discharge him, if he find there is no probable cause for holding him to answer; otherwise he shall admit him to bail or remand him to jail. Such judge may adjourn the examination from day to day or for such longer period as is necessary for the furtherance of justice, on good cause shown by the state or the accused. (R. S. § 7165; 66 v. 294, § 48; S. & C. 1179.)

This section does not apply to persons committed on indictment. Kendle v. Tarbell, 24 O. S. 196.

Sec. 13531. When accused was insane or an idiot at commission of offense.

If, before the indictment of a person confined in jail charged with an offense, notice in writing is given by a citizen to the sheriff or jailer that such person was insane or an idiot at the time the offense was com-

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mitted, or has since become insane, such sheriff or jailer shall forthwith give the notices and an examining court shall be held as provided in the next preceding section. If such judge find that such person was an idiot when he committed the offense, or was then or still is insane, or afterward became and still is insane, he shall, at his discretion, proceed as required by law after inquest held. (R. S. § 7166; 71 v. 46, § 52; 72 v. 80, § 53.)

Sec. 13532. Proceedings when prisoner held to bail.

If the examining court find that the prisoner should be held to bail, it shall order him to enter into a recognizance in such sum and with such sureties as it deems sufficient, for his appearance at the next term of court which has cognizance of the offense, and in default thereof he shall be remanded to jail. If the court to which the accused is recognized is in session, such recognizance shall require him to appear before it forthwith and not depart without leave. When the prisoner is remanded or held to bail, the court shall require the witnesses against him to enter into recognizance to appear at the proper court, as provided in this chapter. On taking such recognizances of witnesses, the clerk shall enter upon the journal the title of the case, the names of such witnesses, the amount severally fixed as to each, the sureties, if any, and the time when such witnesses are required to appear. Such entry shall be a sufficient record of such recognizances. (R. S. § 7167; 69 v. 17, § 49; S. & C. 1179.)

Entry—Prisoner discharged by examining court.

(Title.) Charge of ———.

This day the defendant appeared before the Hon. J M, probate judge of this county, the clerk, and the prosecuting attorney, who upon notice given by the sheriff (or, jailer) according to the statute in such cases made and provided, attended as an examining court for this purpose at the courthouse in the city of ———. And the said judge, upon full examination of witnesses and consideration had, finding † no probable cause for holding the said E F to answer, thereupon discharged him from imprisonment.

Entry—Prisoner remanded to jail by examining court.

(Title.) Charge of ———.

(Follow preceding form to †, and continue:)—probable cause for holding the said E F to answer, remanded him to jail.

(Conclude as from ‡ in next entry.)

Entry—Prisoner admitted to bail by examining court.

(Follow entry when prisoner is discharged to †, and continue:)—probable cause for holding the said E F to answer, ordered that upon entering into recognizance in the sum of ——— dollars, with good and sufficient security, conditioned for his

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appearance at the next term of the court of common pleas of this county (or, before the probate court, on the first day of the next term thereof for the trial of criminal cases (or, forthwith, as the fact was), to answer said charge, he be discharged from confinement; otherwise, that he be remanded to jail.‡

Also the following named witnesses were recognized in the several amounts, and with the sureties severally set opposite their names, for their appearance before the said court at the next term thereof, viz.:

Name of of witness.	Amount of recog.	Surety.
L R.	$300.	S T.
etc.	etc.	etc.

Entry finding that prisoner is insane.

(Title.) (Follow the first form to the * and continue) that the said E F was when he committed the offense charged and still is insane, and it is therefore ordered that he be committed to (here name the asylum or hospital).

Entry finding that prisoner is not insane.

(Title.) (Follow the first form to the * and continue) that the said E F was not insane when he committed the offense charged against him and is not insane now, and it is ordered that the said E F be remanded to the custody of the sheriff.

Sec. 13533. Duty of court when prisoner fails to give security.

If the prisoner fail to gives security, the examining court shall order the clerk to enter on the journal of the court to which the defendant is recognized to appear, in what sum and in what sureties he may be recognized. Upon giving such security, a judge of the superior court, court of common pleas or the probate judge of the proper county may discharge such person. (R. S. § 7168; 66 v. 295, § 50; S. & C. 1179.)

Entry—Order fixing recognizance.

(Title.) Charge of ———.

The defendant, having failed to give the security heretofore ordered by the examining court for his release from confinement, the said court ordered that the amount of such recognizance for the release of the said E F, at any time hereafter, be fixed at the sum of ———, with security, to the approval of any judge releasing him.

Sec. 13534. Proceedings to discharge prisoner on recognizance.

When a person, charged with the commission of a bailable offense or a default of a recognizance to keep the peace, is confined in jail, whether committed by warrant under the hand of a judge or magistrate or by the sheriff or coroner under a warrant upon indictment found or otherwise, a judge of the supreme court, or of the court of common pleas within his district, or the probate judge of his county, may admit such person to bail, by taking his recognizance in such sum and with such sureties as to such judge may seem proper, conditioned for his appearance before the proper court to answer the offense wherewith he is charged. For taking such bail the judge, by special warrant under his hand, may require the sheriff or jailer to bring such accused before him at the courthouse of the proper county, at such time as in such warrant the judge may direct. Such judge shall be governed in the amount and quality of the bail required, by the court of common pleas in all cases in which such court has made an order or direction therein. (R. S. § 7169; 66 v. 295, § 51; S. & C. 1180.)

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If a person is let to bail by a judge of the court of common pleas, in term time, it must be done in open court. No transcript need accompany a recognizance taken by a judge. The recognizance itself is a record, and a full one, if it is what the law requires. Swank v. State, 3 O. S. 429.

A recognizance in a criminal case, conditioned "that the prisoner appear at the *next* term and thereafter, from day to day," etc., binds the surety for the appearance of the prisoner during the first term of the court only, and if the court adjourns wthout making any order, the sureties are exonerated from their recognizance. Swank v. State, 3 O. S. 430.

This section provides a convenient, but by no means necessary, mode of bringing the prisoner before the judge. The warrant for that purpose is not essential to his jurisdiction; if the sheriff voluntarily produce the prisoner, the whole object of the statute is accomplished. State v. West *et al*, 3 O. S. 509.

A writing in the usual form of a recognizance, held not to be rendered invalid as a recognizance by the fact that it was signed by the prisoner and his sureties. Millikin v. State, 21 O. S. 635.

During the term at which an indictment charging a capital offense was set for trial, application was made by the accused for the court to hear testimony to show that the offense was in fact bailable. *Held*, that the application was properly refused. Dendle v. Tarbell, 24 O. S. 196.

In a criminal case, "except for capital offenses where the proof is evident or the presumption great" (Const., Art. I, § 9), after verdict of guilty and before sentence, the court may, in its discretion, take a recognizance for the appearance of the prisoner to abide the judgment of the court. After failure so to appear, and a forfeiture of the recognizance, the sureties are liable on the recognizance. Hampton v. State, 42 O. S. 401.

Sec. 13535. Deposit of recognizance and discharge of prisoner.

When a judge or an examining court recognizes a prisoner under the provisions of this title he shall forthwith deposit with the clerk of the proper court the recognizances so taken, and also a warrant, directed to the jailer, ordering him to discharge the prisoner. (R. S. § 7170; 66 v. 295, § 52; S. & C. 1179.)

A recognizance taken by a single judge, must be returned to the court of common pleas of the county, and a memorandum thereof entered on the minutes of said court to make it matter of record. Sargeant v. State, 16 O. 267.

A declaration upon such recognizance will be bad unless it aver that such return and memorandum were made. Such recognizance can not be declared upon as a common law bond. Sargeant v. State, 16 O. 267.

Sec. 13536. Judges of criminal courts to have concurrent jurisdiction with probate judge.

A court of criminal jurisdiction shall have concurrent jurisdiction with the probate court of such county in all matters wherein, by this title, jurisdiction is conferred on such probate court. (R. S. § 7171; 66 v. 295, § 53; S. & C. 1180.)

Sec. 13537. Recognizance of person indicted for misdemeanor may be taken by officer.

A sheriff or other officer charged with the execution of a warrant issued on an indictment for a misdemeanor, during the vacation of the

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court from which such warrant was issued and also in term time of such court when not in actual session, may take the recognizance of the person so indicted, together with sufficient sureties, resident freeholders of the county from which such warrant issued, in a sum not less than fifty nor more than five hundred dollars, for the appearance of such person, if in vacation, on the first day of the next term of such court, or, if in term time of such court, on the first day thereof when such court will be in actual session. (R. S. § 7172; 84 v. 73; 66 v. 295, § 54; S. & C. 1176.)

Sec. 13538. Return thereof, and the writ.

The sheriff or other officer shall return the warrant according to the command thereof, with the name of the sureties, together with the recognizance taken. Such recognizance shall be filed and recorded by the clerk of the court to which it is returned, and may be proceeded on in a like manner as if it had been taken in such court during term time. (R. S. § 7173; 66 v. 296, § 55; S. & C. 1177.)

Return of sheriff upon a warrant, when commitment is made.

January ———, 19—. I took the body of the within named E F, and for want of recognizance, with security, as the law requires, I committed him to the custody of the jailer of this county, in the jail thereof, with whom I left a certified copy of this writ.

D W, Sheriff of ——— county, O.

Return of sheriff upon warrant, when a recognizance is taken.

January ———, 19—. I took the body of the within named E F, and he having entered into a recognizance for his appearance before the court, as the law requires, with M N and O P, resident freeholders of this county, I released the said E F, upon said recognizance, the same being herewith returned.

D W, Sheriff of ——— county, O.

Entry—Record of recognizance taken by sheriff in vacation.

Clerk's office, ——— county, Ohio,

(Title.) Indictment for ———. July 15, 19—.

This day came the sheriff of this county and returned here the recognizance of the above-named defendant, in the words and figures following, to-wit (copy recognizance in full).

Sec. 13539. On indictment for felony, court may order amount of recognizance.

When a person has been indicted for a felony and has not been arrested or recognized to appear before the court, the court may make

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an entry on the journal fixing the amount in which such person may be recognized for his appearance by an officer charged with the duty of arresting him. (R. S. § 7174; 66 v. 296, § 56; S. & C. 1177.)

Entry—Recognizance fixed in case of felony.

(Title.) Indictment for ———.

The defendant herein not having been arrested or recognized upon the said indictment, it is ordered that the sheriff charged with the duty of arresting said defendant may recognize him, as provided by law, in the sum of ——— dollars.

Sec. 13540. Such amount indorsed on warrant by clerk.

The clerk who issues a warrant on such an indictment shall indorse thereon the sum in which the recognizance of the accused was ordered to be taken. (R. S. § 7175; 66 v. 296, § 57; S. & C. 1177.)

Sec. 13541. Officer to take recognizance accordingly, etc.

The officer charged with the execution of such warrant shall take the recognizance of the accused in the sum ordered, with good and sufficient surety, for his appearance at the return of the writ before the court from which it issued. Such officer shall return the recognizance to the court, to be recorded and proceeded on as provided in this chapter. (R. S. § 7176; 66 v. 296, § 58; S. & C. 1177.)

Former sections corresponding to G. C. §§ 13539, 13540 and this section, construed together, were held to contemplate the arrest of one not yet in custody and to provide only for a recognizance taken by an officer charged "with the duty of arresting" an indicted person. State v. West, 3 O. S. 509.

Entry—Return of recognizance.

(Title.) Indictment for felony.

Now comes the sheriff, and returned to the court the recognizance of this defendant, in the words and figures following, to-wit: (copy recognizance in full).

Sec. 13542. Surrender of defendant by surety in recognizance.

When a surety in a recognizance for the appearance of a defendant before a court, desires to surrender him, such surety shall be discharged from further responsibility thereon by delivering him in open court, or the prosecuting attorney, upon the written request of such surety, shall cause a warrant to issue to the sheriff of any county, directing him to arrest the defendant who shall be committed by the court to the jail of the county, unless he give a new recognizance, with good and sufficient surety, in such amount as the court may determine, conditioned as in the original recognizance. (R. S. § 7177; 91 v. 15; 66 v. 296, § 59.)

A surety on a bail bond who desires to surrender the defendant and delivers him in open court, is not discharged from further responsibility on his bond until the court accepts said delivery, and the only evidence of the delivery is the record of the court. DuLaurence v. State, 12 C. C. (N.S.) 367.

The surrender of a prisoner by his bail must be accepted by the court, and the record is the only competent evidence of the surrender which will exonerate the bond. DuLaurence v. State, 17 C. C. (N.S.) 47, 21 O. C. D. 418.

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Entry—Recognized prisoner delivered and committed.

(Title.) Indictment for ———.

This day came E K, the surety for the defendant herein, and delivered up the body of the said defendant in open court, and asked to be discharged from further liability on his recognizance.

And thereupon the court ordered that the said surety be discharged from his said obligation, † and ordered the said E F into the custody of the sheriff.

Entry—Prisoner delivered, and new recognizance taken.

(Title.) Indictment for ———.

(As in last to †, and continue:)—and fixed the bond of the said defendant at $———.

And thereupon the said E F, with J H as his surety, entered into a new recognizance, as ordered by the court, conditioned as the former for his appearance at the next ——— term of said court, to answer said charge.

Sec. 13543. Delivering up defendant in vacation.

When a surety desires to surrender a defendant in vacation, such surrender shall be made to any judge of the court before which he has been recognized to appear, or to the probate judge of the proper county, in the courthouse thereof. Upon such surrender being made, such judge shall make, sign and deliver to the sheriff or a constable of the county, a warrant for the commitment of such defendant to the jail of the county, unless he forthwith enter into a recognizance, with sufficient surety, conditioned as in the original recognizance, which such judge shall take, approve and return to the clerk of the court to which the defendant was originally recognized, to be proceeded on as if it had been taken in term time. (R. S. § 7178; 66 v. 296, § 60; S. & C. 1178.)

Entry—Prisoner delivered in vacation, and committed.

In Chambers, July 15, 19—.

Before the Hon. R W, Judge of the Common Pleas Court of ——— county, Ohio.

(Title.) Indictment for ———.

This day came E K, the surety for the defendant herein, before me, and delivered up the body of the said E F, in the courthouse of the said county, and asked to be discharged from further responsibility on his recognizance.

And thereupon the said E K was discharged from his said obligation, and the said E F † was committed to the jail of the county.

(Signed), R W, Judge.

Entry—Prisoner delivered in vacation, and recognized.

(Title.) Indictment for ———.

(As in last to †, and continue:)—with J H as his surety, entered into a new recognizance, in the sum of $———, conditioned as the former for his appearance at the next ——— term of the said common pleas court to answer said charge.

(Signed), R W, Judge.

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Sec. 13544. Return of recognizance.

Recognizances taken during vacation, by a judge or other officer authorized so to do, shall be signed and sealed by the parties and certified to by the officer taking them. (R. S. § 7179; 66 v. 297, § 61.)

This section does not apply to recognizances taken by justices of the peace, upon a preliminary examination of a person charged with the commission of an offense Gamble v. State, 21 O. S. 183.

Sec. 13545. Proceedings when party recognized fails to appear.

When a person under recognizance in a criminal prosecution to appear and answer or to testify in court, fails to perform the condition thereof, his default shall be recorded, and such recognizance forfeited in open court. (R. S. § 7180; 71 v. 17, § 1.)

All the defendant has to do is to comply with its letter, because a recognizance has no power beyond its letter. If the condition is impossible to be complied with, as by requiring an appearance before a court that has no existence, or is ambiguous, leaving it doubtful before which of two courts the defendant is to appear, the recognizance is void; or, at all events, if the condition is for appearance before either of two courts, the declaration, in a suit on the recognizance, should show that he appeared before neither. State v. Johnson, 13 O. 176.

What is, and what is not, a performance of the condition, see Swank v. State, 3 O. S. 429; Bishop v. State, 16 O. S. 419; State v. Johnson, 13 O. 176.

A forfeiture may be declared after the continuance of the case, provided it is done at the same term. Swank v. State, supra.

Before G. C. § 13525 was enacted, the sureties on a recognizance in a criminal case for the appearance of the prisoner at the next term of court could not be held upon such recognizance, unless such prisoner was called at such term and failed to appear, and such recognizance was forfeited. State, ex rel., v. Liggotta, 17 C. C. (N.S.) 584.

Entry—Recognizance forfeited.

(Title.) Indictment for ———.

And now comes the prosecuting attorney, on behalf of the State of Ohio, and presents to the court the recognizance of said defendant, taken before ———, on the ——— day of ———, 19—, in the sum of ——— dollars, with J B as surety.

Thereupon, the said defendant being three times solmenly called to appear and answer said charge, as he agreed to do, and failing so to do, and J B, the surety, being three times solmenly called to produce the body of said defendant, as he agreed to do, and failing so to do, the court orders that the said recognizance be, and the same hereby is, forfeited absolutely.

(The court may add:)

And that a capias be issued for said defendant.

Entry—Forfeiture opened up, etc.

(Title.) Indictment for ———.

On motion to the court, by counsel for the defendant, the forfeiture of the recognizance heretofore entered herein is opened up and set aside.

And the defendant, E F, with L R, his surety, enters into recognizance (or, omit the surety, and say, enters into his own recognizance) before the court, in the sum of ——— dollars, conditioned for his appearance at the ——— term of this court, to answer said charge.

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Sec. 13546. Forfeited recognizance to be returned to auditor.

Probate judges, prosecuting attorneys, clerks of the court of common pleas and the police court, justices of the peace and other magistrates, shall return forthwith to the county auditor of their respective counties all forfeited recognizances in criminal cases. (R. S. § 7181; 68 v. 31, § 1.)

Sec. 13547. Auditor to make abstract of and deliver same to prosecuting attorney.

The county auditor shall make, in a book to be kept for that purpose, a memorandum of each recognizance returned to him, the court in which it was taken, the name of the case, the names of all the parties, the amount and date, the person to whom paid, the time when delivered and the final disposition thereof. He shall deliver it to the prosecuting attorney and take his receipt forthwith therefor. (R. S. § 7182; 68 v. 31, §§ 2, 3.)

Sec. 13548. Prosecuting attorney to prosecute action on recognizance

The prosecuting attorney shall prosecute recognizances by him received, for the penalty thereof. Such action shall be governed by the code of civil procedure so far as applicable. (R. S. § 7183; 66 v. 297, § 63.)

Cited in State, ex rel., v. Brewster, 44 O. S. 250.

Cited in State, ex rel., v. Brewster, Auditor, 1 C. C. 373, 1 O. C. D. 207.

Where a default under a recognizance conditioned for appearance on the first of the term, is claimed on the fifth day of the term, it is no defense to show that the accused was on said first day in the custody of the warden of the penitentiary, if he was again at large and might have appeared at the time he was called. Bishop v. State, 16 O. S. 419.

In an action on a recognizance forfeited in the court of common pleas, it was held that parol evidence was not admissible to contradict the record of forfeiture, and that such record could not be impeached by the sureties for fraud. Calvin v. State, 12 O. S. 60.

In an action on a forfeited recognizance, a verdict "for the amount due on the bond," not excepted to at the time, nor made the basis of a motion for a new trial, or in arrest of judgment, will be held sufficient on error. Calvin v. State, 12 O. S. 60.

An action on a forfeited recognizance should be brought in the name of the State of Ohio, and not in the name of the county commissioners. Chandler v. Commissioners, 2 Dec. Rep. 112, 1 W. L. M. 401.

An affidavit setting forth the exact facts relied upon to constitute the forfeiture of a recognizance is sufficient, although it does not allege that the bond was duly forfeited. Kinney v. State, 14 C. C. 91, 7 O. C. D. 97.

A broken recognizance draws interest from the date of its forfeiture. Kinney v. State, 14 C. C. 91, 7 O. C. D. 97.

The state of Ohio is not "the real party in interest" in an action on a forfeited recognizance running to the city of Cleveland taken in a prosecution in the municipal court of such city under a city ordinance. Lilliston v. State, 7 O. A. R. 344.

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Sec. 13549. What shall not defeat an action on recognizance.

An action brought on a recognizance, as provided in the next preceding section, shall not be barred or defeated, nor judgment thereon reversed by the neglect or omission to note or record the default, nor by a defect in the form of such recognizance, if it appear from the tenor thereof at what court the party or witness was bound to appear and that the court or officer before whom it was taken was authorized by law to require and take such recognizance. (R. S. § 7186; 66 v. 297, § 66.)

In a recognizance to appear and answer, the words, "in case said party was legally imprisoned on said charge," are surplusage. State v. Wellman, 3 O. 14.

A recognizance, which is an obligation of record, entered into before some court of record, or magistrate duly authorized, subject to a condition to do some particular act, is invalid unless it contains all the essential parts both of the obligation and the condition; and none of the material parts of either can be supplied by oral testimony. State v. Crippen, 1 O. S. 399.

Where a statute, in prescribing the terms and conditions of a recognizance, requires that the accused shall be bound to appear at the next term, a recognizance omitting the word next, but strictly pursuing the statute in all other respects, will not be deemed invalid for such omission. Proseck v. State, 38 O. S. 606.

A recognizance is a promise to pay a certain sum of money, and on condition broken draws interest from the time when due. Kinney v. State, 14 C. C. 92, 7 O. C. D. 97.

A bond taken by the mayor of a municipality after conviction and sentence, without order of the court of common pleas, is taken without authority and does not constitute a valid common law obligation. Scio v. Hollis, 7 N. P. 281, 10 O. D. 99.

Sec. 13550. Court may remit or reduce penalty, when.

The court, in which the action for the penalty of a forfeited recognizance is brought, may remit or reduce part or the whole of such penalty and render judgment thereon according to the circumstances of the case and the situation of the party, and upon such terms and conditions as seem just and reasonable. (R. S. § 7184; 66 v. 297, § 64.)

Sec. 13551. Court may remit or reduce judgment entered thereon.

When a judgment has been rendered against the defendants, for the whole or part of the penalty of a forfeited recognizance, the court rendering such judgment may remit or reduce the amount thereof, when after such rendition, the accused has been arrested and surrendered to the proper court, to be tried on such charge. (R. S. § 7185; 66 v. 297, § 65; S. & C. 1194.)

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Sec. 13552. Forms of recognizances.

Recognizances substantially in the forms following shall be sufficient:

Recognizance of the accused.

The State of Ohio, ——— county, ss.

Be it remembered, that on the ——— day of ———, in the year ———, E F and G H personally appeared before me, and jointly and severally acknowledged themselves to owe the State of Ohio the sum of ——— dollars, to be levied of their goods and chattels, lands and tenements, if default be made in the condition following, to-wit: The condition of this recognizance is such that if the above bound E F personally be and appear before the court of common pleas, on the first day of the next term thereof (or, if the probate court has jurisdiction of the matter or offense, on the first day of the next term of the probate court for the trial of criminal cases, or, if such court is at the time in session, the recognizance shall require the accused to appear forthwith before it), then and there to answer a charge of (here name the offense with which the accused is charged), and abide the judgment of the court, and not depart without leave, then this recognizance shall be void; otherwise it shall be and remain in full force and virtue in law.

Taken and acknowledged before me, on the day and year above written.

A B, Justice of the Peace.

Recognizance of witness.

The State of Ohio, ——— county, ss.

Be it remembered, that on the ——— day of ———, in the year ———, E F and G H personally appeared before me, and jointly and severally acknowledged themselves to owe the State of Ohio the sum of ——— dollars, to be levied of their goods and chattels, lands and tenements, if default be made in the condition following to-wit: The condition of this recognizance is such that if the above bound E F personally be and appear before the court of common pleas, on the first day of the next term thereof (or, if the probate court has jurisdiction of the matter or offense, on the first day of the next term of the probate court for the trial of criminal cases, or, if such court is at the time in session, the recognizance shall require the witness to appear forthwith before it), then and there to give evidence and the truth to say on behalf of the state, touching such matters as shall then and there be required of him, and not depart the court without leave, then this recognizance shall be void; otherwise it shall remain in full force and virtue in law.

Taken and acknowledged before me, on the day and year above written.

A B, Justice of the Peace.

To keep the peace.

The State of Ohio, ——— county, ss.

Be it remembered, that on the ——— day of ———, in the year of ———, E F and G H personally appeared before me and jointly and severally acknowledged themselves to owe the State of Ohio the sum of ——— dollars, to be levied of their goods and chattels, lands and tenements, if default be made in the condition following, to-wit: The condition of this recognizance is such that if the above bound E F personally be and appear before the court of common pleas, on the first day of the next term thereof (or, if the probate court has jurisdiction of the matter or offense, on the first day of the next term of the probate court for the trial of criminal cases, or, if such court is at the time in session, the recognizance shall require the accused

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to appear forthwith before it), then and there to answer unto a complaint of C D that he has reason to fear and does fear, that the said E. F will (here state the charge in the complaint), and abide the order of the court thereon, and in the meantime to keep the peace and be of good behavior toward the citizens of the state generally, and especially toward the said C D, then this recognizance shall be void; otherwise it shall be and remain in full force and virtue in law.

Taken and acknowledged before me, on the day and year above written.

A B, Justice of the Peace.

(R. S. § 7187; 35 v. 87, § 33; S. & C. 817, 818.)

Section thirty-three of the act of March 27, 1837 (S. & C. 815, 819), prescribing forms to be observed by justices of the peace in criminal proceedings has not been repealed, either expressly or by implication, by the code of criminal procedure (62 O. L. § 287, et seq.). Gamble v. State, 21 O. S. 163.

Sec. 13553. Forms of commitments.

Commitments substantially in the forms following shall be sufficient:

Commitment after examination.

The State of Ohio, ——— county, ss.

To the keeper of the jail of the county aforesaid, greeting:

Whereas, E F has been arrested, on the oath of C D, for (here describe the offense), and has been examined by me on such charge, and required to give bail in the sum of ——— dollars for his appearance before the court of common pleas (or before the probate court, on the first day of the next term thereof for the trial of criminal cases, or forthwith, as the fact was), with which requisition he has failed to comply. Therefore, in the name of the State of Ohio, I command you to receive the said E F into your custody, in the jail of the county aforesaid, there to remain until discharged by due course of law.

Given under my hand, this ——— day of ———, ———.

A B, Justice of the Peace.

Commitment pending examination.

The State of Ohio, ——— county, ss.

To the keeper of the jail of the county aforesaid, greeting:

Whereas, E F has been arrested, on the oath of C D, for (here describe the offense according to the facts), and has been brought before me for examination, and the same has been necessarily postponed by reason of (here state the cause of delay according to the fact). Therefore, I command you, in the name of the State of Ohio, to receive the said E F into your custody, in the jail of the county aforesaid (or in such other place as the justice shall name), there to remain until discharged by due course of law.

Given under my hand, this ——— day of ———, ———.

A B, Justice of the Peace.

(R. S. § 7188; 35 v. 87, § 33; S. & C. 818.)

Cited, Newberry v. State, 15 C. C. 208, 7 O. C. D. 626.

The fact that the mittimus does not properly describe the offense "of stoning passenger car of railroad train," does not make the imprisonment illegal. State, ex rel., v. Hamilton, 3 C. C. 10, 2 O. C. D. 6.

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CHAPTER VII.

THE GRAND JURY AND ITS PROCEEDINGS.

SECTION

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Sec. 13554. Clerk shall make two lists of the persons required to appear at court.

Before the first day of each term of a court at which a grand jury is summoned to appear, the clerk of such court shall make two lists, entering therein the names of the persons appearing, by the returns of the magistrate, to have been committed or bailed for an offense during the vacation of the court, the name of the magistrate who committed or bailed such person, and whether such person was committed or bailed. One of such lists shall be delivered by the judge of such court to the foreman of the grand jury, and the other, with the transcripts and documents returned by such magistrate, shall be delivered to the prosecuting attorney. (R. S. § 7189.)

Cited in support of the proposition that a criminal prosecution is a "case pending," when the transcript of the examining magistrate is filed with the clerk of the court of common pleas. State v. Morrow, 90 O. S. 202.

The act of January 9, 1823, providing for the impaneling of a grand jury, prescribed the number of grand jurors as neither more nor less than fifteen. Young v. State, 6 O. 435.

An indictment found by a grand jury, composed of less than fifteen persons having the qualifications required by statute, is not sufficient to put the accused upon trial. Doyle v. State, 17 O. 222.

There is no law requiring that the list of the grand jury be furnished the accused. Mahan v. State, 10 O. 234; overruled, Fouts v. State, 8 O. S. 98.

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What constitutes good ground to challenge panel. Huling v. State, 17 O. S. 583.

Fact that one of the grand jury was not eligible, good on motion. Doyle v. State, 17 O. 222; Huling v. State, 17 O. S. 583.

After conviction and sentence, the defendant can not avail himself for the first time that the record failed to show the impaneling of the grand jury. Young v. State, 23 O. S. 577.

That a person has subscribed funds for the purpose of legitimately suppressing crime, does not disqualify him from sitting on the grand jury; nor is it ground of disqualification that he has evinced a desire and purpose to enforce the laws. Koch v. State, 32 O. S. 353.

The fact that township trustees caused one of their number to be returned as grand juror, does not disqualify him from serving as such. Koch v. State, 32 O. S. 353.

If the names of the grand jury do not appear in the record, error will lie, but the reviewing court will probably order a more complete record. Mahan v. State, 10 O. 232.

The provisions exempting certain persons from service as jurors does not have the effect of disqualifying them, but merely extends to them a privilege, which they may waive. Glassinger v. State, 24 O. S. 353.

It is not a good plea to an indictment for murder, that a member of the grand jury which found the indictment was a nephew of the person murdered. State v. Easter, 30 O. S. 542.

Record need not show qualifications of grand jurors. Billigheimer v. State, 32 O. S. 439.

The names of the grand jurors ought to appear in some part of the record. Mahan v. State, 10 O. 233. (See Fouts v. State, 8 O. S. 98.)

It is not essential that the record of the conviction of a person should set out and show expressly that the grand jurors, who returned the indictment, had the qualifications of electors of the county. Parks v. State, 4 O. S. 234.

Irregularities and defects in the selection, drawing and impaneling of a grand jury can not be taken advantage of by a plea in abatement. Lynch v. State, 23 C. C. (N.S.) 230.

It is impracticable that the qualifications of grand jurors should be inquired into with the same care as in the case of petit jurors, and if it should happen through the infirmities of human nature that a citizen were wrongfully indicted by a grand jury whose qualifications have been favorably passed upon by the jury commission and who have taken the required oath, his remedy is not by a plea in abatement, but with a presumption of innocence still attending him he must rely upon a judge and petit jury to establish his innocence. State v. Laning, 7 N. P. (N.S.) 281, 18 O. D. 672.

Sec. 13555. The court shall appoint a foreman.

When the grand jury is impaneled in the manner provided by law, the court shall appoint one of the members thereof as foreman. (R. S. § 7190; 66 v. 298, § 68.)

Cited as to the appointment of a foreman of the grand jury. State v. Rhoads, 81 Ohio St. 397.

Sec. 13556. Oath to foreman.

When the foreman is appointed, an oath shall be administered to him in the following words: "Saving yourself and fellow jurors, you, as foreman of this grand inquest, shall diligently inquire, and true presentment make, of all such matters and things as shall be given you in charge, or otherwise come to your knowledge, touching the present service; the counsel of the state, your own and your fellows, you shall

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keep secret, unless called on in a court of justice to make disclosures; and you shall present no person through malice, hatred, or ill-will, nor shall you leave any person unpresented through fear, favor, or affection, or for any reward, or hope thereof; but in all your presentments you shall present the truth, the whole truth, and nothing but the truth, according to the best of your skill and understanding." (R. S. § 7191; 66 v. 298, § 69; S. & C. 753.)

This language seems to indicate that the grand juror may be called upon to act in cases both of enemies and friends. If the first, his oath is that neither malice, hatred nor ill-will shall influence his deliberate and impartial judgment. In the last, no considerations of passion or friendship shall disturb the just discharge of his duties. State v. Easter, 30 O. S. 550.

Cited with reference to the oath to be administered to a foreman of a grand jury. State v. Rhoads, 81 Ohio St. 397.

Sec. 13557. Oath to other grand jurors.

Thereupon the following oath shall be administered to the other grand jurors: "The same oath which A. B., your foreman, hath taken before you on his part, you, and each of you, shall well and truly observe and keep on your respective parts." (R. S. § 7192; 66 v. 298, § 70; S. & C. 753.)

Sec. 13558. Charge of the court.

The grand jurors, after being sworn, shall be charged as to their duty by the judge, who shall call their attention particularly to the obligation of secrecy which their oaths impose, and explain to them the law applicable to such matters as may be brought before them. (R. S. § 7193; 66 v. 298, § 71.)

Error in the charge to the grand jury can not be reached by a plea in abatement. Stahl v. State, 11 C. C. 23, at pages 34, 35, 5 O. C. D. 29.

It is the duty of the court to call the attention of the grand jury to matters requiring investigation, and if a mistake were made in that respect it would not afford ground for a plea in abatement. State v. Laning, 7 N. P. (N.S.) 281, 18 O. D. 672.

Sec. 13559. What grand jury shall do.

After the charge of the court, the grand jury shall retire, with the officer appointed to attend it, and proceed to inquire of and present all offenses committed within the county in and for which it was impaneled and sworn. (R. S. § 7194; 66 v. 298, § 72; S. & C. 753.)

It must appear from the indictment with certainty that the offense charged was committed in the state, and within the county where the indictment is returned. Foster v. State, 19 O. S. 417.

But the grand jury can, under the habitual criminal act, include a charge of two prior convictions. Blackburn v. State, 50 O. S. 428.

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The general rule of criminal pleading is very familiar, that an indictment, as one of its essential features, must contain the averment of time and place, and having been once properly plead in that regard, that the use of the words "then and there" as to each subsequent fact, will be a sufficient averment of time and place. Stahl v. State, 11 C. C. 23, 27, 5 O. C. D. 29.

An indictment purporting to be by "the grand jurors of the State of Ohio inquiring of crimes and offenses within and for the county of Monroe," must be taken as found by a grand jury of the county, as well as for the state, and is, therefore, found by such a body as the law intends. Mackey v. State, 3 O. S. 362.

In order to find an indictment the evidence before the grand jury unexplained and uncontradicted should authorize a petit jury to convict the accused of the crime charged. In re Commissioners, 7 N. P. 450, 5 O. D. 691.

The rule requiring evidence in criminal cases to establish the guilt of the accused beyond a reasonable doubt, has no application to the conclusion of the grand jury. In re Commissioners, 7 N. P. 450, 5 O. D. 691.

A plea in abatement to an indictment alleging that the grand jury which returned the indictment did not have before it or within the knowledge of its members any evidence connecting the defendant with the crime alleged, does not set up a defect in the record by facts extrinsic thereto, and a demurrer to such a plea must therefore be sustained. State v. Schroder, 16 N. P. (N.S.) 265.

A grand jury may return an indictment based wholly on facts within the knowledge of the jurors and without hearing any evidence upon such question. State v. Woolard, 12 N. P. (N.S.) 395, 22 O. D. 652.

A special grand jury called to investigate a particular offense may investigate any violation of the criminal laws of this state. In re Commissioners, 7 N. P. 450, 5 O. D. 691.

The taking of further testimony by a grand jury with reference to an offense which has been made the subject of an indictment, but under which no issue has yet been made, is a matter which is wholly within the discretion of that body, and, though unusual, such action is not irregular, and a motion does not lie to require that the defendant be furnished with a copy of the evidence so taken. State v. Hoover, 17 N. P. (N.S.) 65, 24 O. D. 212 (affirmed with report, Hoover v. State, 91 O. S. 41).

Sec. 13560. Prosecuting attorney and attorney-general may have access to grand jury.

The prosecuting attorney or assistant prosecuting attorney shall be allowed at all times to appear before the grand jury for the purpose of giving information relative to a matter cognizable by it or advise upon a legal matter when required. Such attorney may interrogate witnesses before such jury when it or he deems it necessary, but no other person shall be permitted to remain in the room with the jury while the jurors are expressing their views or giving their votes on a matter before them. In a matter or case which the attorney-general is required to investigate or prosecute by the governor or general assembly, he shall have all the rights, privileges and powers conferred by this section and the next succeeding section, upon prosecuting attorneys. (R. S. § 7195; 69 v. 3, § 1; 95 v. 326; 98 v. 26.)

A motion does not lie for an order on the official stenographer for a copy of the testimony of the accused which he gave before the grand jury. State v. Rhoads, 81 Ohio St. 397.

Cited with reference to the privilege of the prosecuting attorney to interrogate witnesses before the grand jury. State v. Rhoads, 81 O. S. 397.

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The mere presence of the prosecuting attorney or his assistant in the same room with the grand jurors while they are deliberating or casting their votes, is not sufficient to sustain a plea in abatement or discharge an indictment, in the absence of any proof of misconduct on the part of these officers which resulted in prejudice toward the accused, or in the finding of an indictment which would not otherwise have been found; but the great weight of authority is to the effect that the prosecutor has no right to remain in the room while the grand jurors are expressing their views or casting their votes upon any matter before them. State v. Stichtenoth, 8 N. P. (N.S.) 297, 19 O. D. 623.

Sec. 13561. Court stenographer; duties and oath.

The official stenographer of the county, at the request of the prosecuting attorney, shall take shorthand notes of the testimony and furnish a transcript thereof to him and to no other person, but the stenographer shall withdraw from the jury room before the jurors begin to express their views or give their votes on a matter before them. The stenographer shall take an oath, to be administered by the court after the grand jurors are sworn, imposing an obligation of secrecy to not disclose any testimony taken or heard except to such jury or prosecutor, unless called upon in a court of justice to make disclosures. (R. S. § 7195; 95 v. 326; 98 v. 26.)

A person charged with crime is not entitled, before, or at the time of trial, to the minutes of the evidence taken before the grand jury, on which the indictment was found against him, nor to an inspection of a transcript of such evidence, and it is error for the court to order the prosecuting attorney to deliver said minutes, or a transcript of said evidence so taken, to the defendant or his counsel, or to order the prosecuting attorney to permit either of them to make an inspection thereof. State v. Rhoads, 81 O. S. 307.

A motion will not lie to compel an official stenographer to produce for the use of the accused a copy of the testimony given by the accused before the grand jury which indicted him. State v. Gibbs, 9 N. P. (N.S.) 129, 20 O. D. 1.

When the ground has been properly laid for impeaching a witness, it is not error to permit a stenographer who took his testimony before the grand jury to state that certain questions were there asked the witness and answers given by him and the stenographer may refresh his memory from his written notes of such testimony. John v. State, 16 C. C. (N.S.) 316.

Even prior to the enactment of this section, the presence of an official stenographer to take the testimony of witnesses before the grand jury, was not prejudicial to one against whom an indictment was found, where it appeared that the stenographer was present only during the examination of witnesses, that no comment was made upon the testimony in his presence, that the jurors neither expressed their views nor voted in his presence, that he did not influence in any way the indictment, and that his notes were securely kept and not transcribed until after the discharge of the grand jury, when a "personal" copy was delivered to the prosecutor. State v. Mumaw, 12 O. D. 785.

The court of common pleas has no power to entertain a motion by the defendant to inspect the minutes of the grand jury or a transcript made by the official stenographer of the testimony before the grand jury. State v. Haugh, 4 N. P. (N.S.) 79, 16 O. D. 477.

The presence in the grand jury room of the assistant to the official stenographer does not invalidate an indictment, where it does not appear that the assistant participated in the discussion, or offered any comment, or was present at the time the vote was taken, or in any other way prejudiced the rights of the defendant. State v. Metzger, 10 N. P. (N.S.) 97, 21 O. D. 72 (exceptions overruled, 83 O. S. 513).

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Sec. 13562. Appointment of counsel to assist prosecuting attorney.

The common pleas court or the court of appeals, whenever it is of the opinion that the public interest requires it, may appoint an attorney to assist the prosecuting attorney in the trial of a case pending in such court, and the county commissioners shall pay such assistant such compensation for his services as such court approves and to them seems just and proper. (R. S. § 7196; 82 v. 16, 39; 75 v. 47, § 1; S. & C. 1226; S. & S. 634; 103 v. 433.)

The attorney appointed to assist the prosecuting attorney need not be sworn nor give bond. Martin v. State, 16 O. 364.

A court of common pleas, held by a single judge, has power, under the act of 1875 (75 Ohio L. 47, § 8), to appoint an attorney to assist the prosecuting attorney in the trial of any case pending in such court; and the rule is not different in Hamilton county, although the prosecuting attorney, and an assistant prosecuting attorney appointed under § 9 of the same act, be present and participate in such trial. Price v. State, 35 O. S. 601.

The court should not appoint an attorney, under said § 8, to assist in the trial of one charged with crime, merely because the prosecuting attorney, the injured person, or his friends, request that such appointment be made, nor unless, in the opinion of the court, the public interest requires such appointment; but, where such appointment has been made, it will be presumed, in the absence of any showing to the contrary, that it was properly made. Price v. State, 35 O. S. 601.

For decision under act of April 30, 1852 (S. & C. 1226), as to the compensation of assistant to prosecuting attorney, see State *ex rel* v. County Commisisoners, 20 O. S. 421.

When an attorney, appointed under this section, presents his bill for services, approved by the court, it is the duty of the county commissioners to act, and allow such sum as seems to them just and proper; they may be compelled to act. Ohio *ex rel* v. Commissioners of Hocking Co., 40 O. S. 331.

There is no appeal from the final allowance made by the commissioners to an attorney appointed by court to assist the prosecution in a criminal case. Commissioners v. Osborn *et al.*, 46 O. S. 271.

The appointment of an attorney-at-law by the court of common pleas, under the provisions of § 7196, Revised Statutes, to assist the prosecuting attorney in the trial of a criminal case pending in such court, though, on the showing made, it would seem to have been an unsuitable appointment owing to the feeling of the person so appointed against the defendant, and his personal interest in his conviction, is not of itself sufficient to justify a reviewing court in reversing a judgment against the defendant on that ground alone. It might be good ground for so doing if it were made to appear that by reason of such feeling the substantial rights of the defendant were prejudiced, which does not appear in this case. Martin v. State, 17 C. C. 406; 9 O. C. D. 621.

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Entry appointing assistant counsel.

It is the opinion of the court that public interest requires the appointment of an attorney to assist the prosecuting attorney in the trial of the case of the State of Ohio v. E F, now pending in this court, and N M, is hereby appointed as such assistant counsel. And thereupon the said N M, appeared in open court and accepted said appointment.

Sec. 13563. Clerk to issue subpoenas for witnesses.

When required by the grand jury or the prosecuting attorney, the clerk of the court in which such jury was impaneled, shall issue subpœnas and other process to any county to bring witnesses to testify before such jury. (R. S. § 7198; 66 v. 299, § 74.)

Sec. 13564. Oath of witness, and certificate thereof.

Before a witness shall be examined by the grand jury, an oath shall be administered to him by the clerk of the court, truly to testify of such matters and things as may lawfully be inquired of before such jury, a certificate whereof such clerk shall make and deliver to such witness who shall present it to the foreman of the grand jury when he is admitted for examination. (R. S. § 7199; 68 v. 3, § 75.)

The vital provision of this section is that "before any witness is examined by the grand jury, an oath shall be administered to him by the clerk." If this provision be observed, an indictment found upon the testimony of the witness will not be held to have been illegally found, because the court has not certified that such oath or affirmation had been administered by the clerk, or because such certificate, if made, has not been delivered to the witness, and by him presented to the foreman of the grand jury when he is admitted for examination. Duke v. State, 20 O. S. 225.

Where witnesses have been duly sworn and sent to a grand jury, and there examined, and an indictment found and presented, it is not necessary that they should be recalled and re-examined, to warrant the grand jury in finding another indictment against the same person, and before the former one has been nollied. Whiting v. State, 48 O. S. 220.

Compensation of clerk of court for swearing witnesses to testify before grand jury, giving certificates of their qualifications and issuing certificates for their fees, is provided by G. C. § 2903, but there is no provision of pay for the return of a certificate of qualification to the clerk and its filing by him. Commissioners v. Welliver, 12 C. C. 440, 5 O. C. D. 569.

An oath properly administered by a proper officer to a witness subpoenaed to appear before a grand jury is an oath authorized by law within the meaning of G. C. § 12842, without reference to whether the witness later claims his constitutional privilege to refuse to testify concerning any inquiry touching his own conduct or waives this privilege and voluntarily testifies. State v. Cox, 87 O. S. 313.

An indictment will not lie for the giving of false testimony before a grand jury, where from a reading of the indictment it is impossible to determine why or upon what ground the matter to which the defendant testified was material to the investigation which was being carried on by the grand jury. State v. Tanner, 9 O. L. R. 18.

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Sec. 13565. Proceedings when witness before grand jury refuses to testify.

If a witness before a grand jury refuse to answer an interrogatory, the fact shall be communicated to the court in writing, in which such interrogatory shall be stated, with the excuse for the refusal, if any be given by the person interrogated. Such court shall thereupon determine whether the witness is required to answer and such grand jury shall be forthwith informed of such decision. (R. S. § 7200; 66 v. 299, § 76.)

Notice to the court that a witness refuses to answer a question before the grand jury.

To the honorable judge of the court of common pleas of ——— county, Ohio:

Notice is hereby given that L S, a witness, sworn and appearing before the grand jury of said county, refuses to answer the following question put to him by the foreman thereof (or, by the prosecuting attorney, as the case may be), to wit: (state the question).

And for excuse for such refusal the said L S says (state the excuse, if any, and if none is made, say, and for such refusal the said L S renders no excuse)

This ——— day of ———, 19—. N W, Foreman

Sec. 13566. Court may proceed against him for contempt.

If the court determine that the witness is required to answer, and he persist in his refusal, he shall be brought before the court, which shall proceed in a like manner as if such witness had been interrogated and refused to answer in open court. (R. S. § 7201; 66 v. 299, § 77.)

Entry in contempt proceedings.

This day came N M, the prosecuting attorney of ——— county and filed an information under oath, charging that E F, a witness before the grand jury of said county refused to answer the following question before the grand jury, to-wit: (here copy the question in full). And the said E F being present in court, and said information having been read to him, said that he was ready to be tried upon the said charge. Thereupon this cause came on for hearing, and it appearing to the court that the said E F has no valid or legal excuse for his refusal to answer the said question, it is therefore ordered and considered that a fine of ——— dollars be imposed upon the said E F for said contempt, and that he pay the costs of this proceeding, taxed at $———, for which execution is awarded.

(If the court orders imprisonment follow the preceding form to and including the word "considered" and add the following:)

that the said E F be imprisoned in the county jail of said county of ——— until he submit to answer the said question, or he be otherwise discharged by law. It is further ordered that a mittimus be issued to the sheriff of ——— county for his said commitment.

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Sec. 13567. Court may appoint grand juror in case of death, etc., of one of the panel.

In a case of sickness, death, discharge or non-attendance of a grand juror, after the grand jury is sworn, the court may cause another to be sworn in his stead. (R. S. § 7202; 66 v. 299, § 78; S. & C. 754.)

Where, after a grand jury has been sworn, a member is discharged on account of sickness, and another person having the legal qualifications is sworn in his stead, as provided by R. S. § 7202 and the person so sworn takes his place on the panel, the body so constituted is a legal grand jury, though a foreman be not again appointed, nor the oath readministered to him, or to the other members as a body. State v. Thomas, 61 O. S. 444.

Proper reasons for excusing a juror will be presumed in the absence of facts showing the contrary. Stahl v. State, 11 O. C. 23, 5 O. C. D. 29.

A deficiency of six grand jurors in the regular grand jury may be filled under the provisions of this section and it is unnecessary to issue a special venire. State v. Laning, 7 N. P. (N.S.) 281, 18 O. D. 672.

Entry—Juror sworn in place of one sick.

It appearing that G H, one of the grand jurors heretofore impaneled and sworn, is unable, by reason of sickness, further to attend thereon, it is ordered that L B be sworn in the stead of said G H, as such grand juror.

Sec. 13568. A new grand jury may be summoned.

After the discharge of the grand jury, the court, when necessary, may order the sheriff to call together a new grand jury, from the bystanders or neighboring citizens, of fifteen good and lawful men having the qualifications of grand jurors, who shall be returned and sworn, and proceed in the manner provided by law. (R. S. § 7203; 66 v. 299, § 79; S. & C. 758.)

Sections 5189a, 5189b, 5189d, 5189e, 5189f do not in effect exempt Hamilton county from the operation of R. S. § 7203. But if this be not so, an indictment presented by a new grand jury, selected and impaneled as provided for in said last-named section, without any objection from any one, will not be quashed, or a verdict of guilty on said indictment set aside, solely on this account. McCarthy v. State, 5 C. C. 627, 3 O. C. D. 306 (affirmed, 27 W. L. B. 332).

The court or sheriff may call persons whom they deem fit for service upon a jury, and the competency of such persons to serve as jurors is not affected by the fact that their names were not drawn from the jury wheel. State v. Metzger, 10 N. P. (N.S.) 97, 21 O. D. 72 (exceptions overruled, 83 O. S. 513).

Entry—Formation of new grand jury.

It being deemed necessary, the court this day ordered the sheriff to call together a new grand jury, by summoning from among the bystanders or neighboring citizens fifteen good and lawful men having the qualifications of grand jurors.

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Whereupon the following named persons were called, and appeared in answer thereto, to-wit:

1. R M.
2. L R, etc.

And the court appointed R M foreman of the said grand jury, and he, with his fellow jurors, took the oaths, etc. (as in regular grand jury).

Sec. 13569. The fact that indictment has been found to be kept secret.

A grand juror or officer of the court shall not disclose that an indictment has been found against a person not in custody or under bail, except by the issue of process, before such indictment is filed and the case docketed. (R. S. § 7204; 66 v. 299, § 80.)

Sec. 13570. No grand juror may testify as to what transpired in jury room.

A grand juror shall not be allowed to state or testify in court in what manner a member of the grand jury voted on a question before them or what opinion was expressed by such juror in relation thereto. (R. S. § 7205; 66 v. 299, § 81.)

See Richards v. Foulks, 3 O. 52.

Comparing G. C. § 13556 with this section, it will be seen that, although the grand jurors may make disclosures in a court of law as to some of the things which transpired in the grand jury room, they shall not be compelled or even permitted to make disclosures concerning their deliberation and voting. State v. Stichtenoth, 8 N. P. (N.S.) 297, 19 O. D. 623.

Sec. 13571. How many must agree to the finding of a bill, etc.

At least twelve of the grand jurors must concur in the finding of an indictment; and, when so found, the foreman shall indorse on such indictment the words "A true bill," and subscribe his name as foreman. (R. S. § 7206; 66 v. 299, § 82; S. & C. 753.)

The grand jury, fifteen in number, must all consult, deliberate, and inquire sufficiently to satisfy themselves of the truth of their investigations; but twelve only need concur in finding a bill. If twelve jurors agree in finding a bill, it cannot be invalidated by showing misconduct of one of the fifteen, nor can inquiry be made upon what ground any one of the twelve jurors concurred in the finding. Turk v. State, 7 O. 528.

A plea impeaching the conduct of a grand jury, and alleging facts in contradiction of the journal, cannot be sustained. *Ib.*

An indictment found by a grand jury composed of less than fifteen persons having the qualifications required by statute, is not sufficient to put the accused upon trial; and a plea to the indictment that one of the grand jurors had not the requisite statutory qualifications, is a good plea in bar. Doyle v. State, 17 O. 222.

Omission of the word "foreman" to the name of the foreman of the grand jury, indorsed on an indictment is not fatal. Whiting v. State, 48 O. S. 220.

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It is not necessary under our statutes that the prosecuting attorney should sign the indictment. But even if necessary, the omission would be cured by § 7215, Revised Statutes, and would not be a good ground for setting aside the verdict. Jones v. State, 14 C. C. 35, 7 O. C. D. 305.

The provision (R. S. § 7206) that when an indictment is found, the foreman shall indorse on it the words "a true bill," is satisfied where these words were printed on a blank indictment, and he signs under them after it is found. Whether he did so sign, having been put in issue by a plea in abatement, was submitted to the jury before the trial. State v. Williamson, 4 W. L. B. 279.

Where the foreman signs the indictment in the space provided for the clerk, it is not sufficient ground on which to quash the indictment. State v. Lewis, 7 N. P. 533, 5 O. D. 552.

The signature of a prosecuting attorney to an indictment, while usual after a matter of good practice, is not required by statute or common law. State v. Mulford, 12 O. D. 655.

Sec. 13572. When name of prosecuting witness indorsed on indictment.

An indictment for a misdemeanor shall not be found a true bill by a grand jury if the name of the prosecuting witness is not indorsed thereon, unless such bill is found upon sworn testimony sent before the grand jury at the request of the prosecuting attorney or the foreman of the grand jury, in which case the fact that the bill was so found shall be indorsed on the bill. This section shall not apply to the following misdemeanors:

1. Being found in a state of intoxication;

2. Keeping a place where intoxicating liquor is sold in violation of law;

3. Buying intoxicating liquor for, or furnishing it to a minor or person intoxicated or in the habit of getting intoxicated;

4. Selling, giving away or disposing of intoxicating liquor or exposing it for sale nearer to a public gathering than is permitted by law;

5. Selling intoxicating liquor or keeping a house of ill-fame nearer to a public institution than is permitted by law;

6. Conveying spirituous or malt liquor or wine into a jail, or permitting a prisoner therein to receive it.

7. Selling or giving away spirituous, vinous or malt liquors on election day, or failing to keep closed, upon election day, a house where such liquor is habitually sold and drank. (R. S. § 7207; 68 v. 3, § 83; S. & C. 1196, 434.)

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The necessity for the indorsement depends upon the character of the indictment as it is found by the grand jury. If the character of the indictment, when found "a true bill" by the grand jury, was such as to require no further indorsement, the indictment cannot afterward become defective, for want of such indorsement, by reason of the defendant's not being found guilty of the highest grade of crime which is charged therein. The indorsement is not required where, under an indictment for felony, the conviction is of a misdemeanor only. Baker v. State, 12 O. S. 214; White v. State, 13 O. S. 569.

Where the name of a person, preceded by the words "good for costs," is found indorsed upon an indictment for a misdemeanor, when presented to the court as a true bill by the grand jury, such name so indorsed will, when nothing appears to the contrary, be presumed to be that of the prosecuting witness. It is not error to overrule a motion to quash such indictment on the ground that the person whose name is indorsed does not affirmatively appear to have been the prosecuting witness. Munson v. State, 20 O. S. 232.

An objection to an indictment on the ground that it is not indorsed as required by this section, should be made by a motion to quash; and where the accused, without making such motion, pleads guilty, the objection is waived. Picket v. State, 22 O. S. 405; White v. State, 13 O. S. 569.

An indictment for a misdemeanor not within any of the exceptions named in this section, which is neither indorsed by the prosecuting witness nor by the prosecuting attorney is defective on a motion to quash; but where the accused, without making such motion, pleads guilty, the objection is waived. Picket v. State, 22 O. S. 405.

It is not necessary that an information should be indorsed with the name of the prosecuting witness. Bartlett v. State, 28 O. S. 669.

Sec. 13573. Proceedings against prosecuting witness when accused is acquitted.

In cases in which the name of the prosecuting witness is indorsed on the indictment which is found a true bill by the grand jury, and, upon trial, the defendant is acquitted, such witness shall be liable for costs. At the term at which such acquittal is had, or a subsequent term, the court shall render judgment against such witness for the costs, unless there were reasonable grounds for instituting such prosecution. (R. S. § 7208; 66 v. 300, § 84; S. & C. 1196, 435.)

Where the name of a person, preceded by the words "good for costs" is found indorsed upon an indictment, when presented to the court by the grand jury, such name will, nothing appearing to the contrary, be presumed to be that of the prosecuting witness. Munson v. State, 20 O. S. 232.

Sec. 13574. The grand jury to visit the jail.

The grand jurors shall visit the county jail, once during such term of court, examine its state and condition, and inquire into the discipline and treatment of the prisoners, their habits, diet and accommo-

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dations. They shall report to the court, in writing, whether the rules prescribed by such court have been faithfully kept and observed, and whether the law for the regulation of county jails has been violated, stating the particulars of such violations. (R. S. § 7209; 66 v. 300, § 85; S. & C. 747.)

Sec. 13575. Proceedings when indictments are returned to court.

Indictments found by a grand jury shall be presented by the foreman to the court and filed with the clerk thereof who shall indorse thereon the day of such filing and enter each case upon the appearance docket and the trial docket of the term, when the persons indicted have been arrested. The court shall assign such indictments for trial as early in such term as is practicable, and the recognizances of defendants and witnesses shall be taken for their appearance at the time so assigned. When a case is continued to the next term of the court, such recognizances shall require the appearance of the defendants and witnesses on such day thereof as the court may direct. At the end of the term, such clerk shall deliver the indictments undisposed of to the prosecuting attorney for safe-keeping. (R. S. § 7210; 69 v. 18, § 86.)

A recognizance in a criminal case, conditioned "that the prisoner appear at the next term, and thereafter from day to day, and abide the judgment of the court, and not depart the court without leave," binds the surety for the appearance of the prisoner during the first term of the court only, and if the court adjourn without making any order, the sureties are exonerated from their recognizance. During the appearance term a new recognizance should be taken, or the prisoner committed to jail. Such recognizance may be taken either at the time of continuance, or at any day thereafter during the term, and the prisoner may be called for that purpose after the continuance of the case, and if he fails to appear, his recognizance may be forfeited. Swank v. State, 3 O. S. 429.

An objection that it does not appear in the record that the indictment found by the grand jury was "presented by the foreman to the court," is waived by the plea of not guilty, when there is no motion to quash. Kerr v. State, 36 O. S. 614.

Though the better practice, it is not necessary as a matter of law, that the foreman of a grand jury, in indorsing an indictment "a true bill," should describe himself as foreman, for, being appointed by the court, it is presumed to know who the foreman is. Whiting v. State, 48 O. S. 220.

A journal entry, "It is hereby ordered that all cases not otherwise disposed of be and the same are continued to the next term of this court. Thereupon the October term, A. D. 1913, adjourned sine die this 31st day of December, 1913," which entry was in fact prepared on January 3, 1914, on which date the court actually did adjourn, and which journal entry is corrected subsequently so as to show that the common pleas court did not adjourn until January 3, 1914, does not dissolve or discharge a grand jury which was impaneled December 1, 1913, which filed its first and partial report on December 9, 1913, and which filed its second and final report on January 3, 1914. Such facts do not amount to a sufficient plea in abatement to an indictment returned January 3, 1914. State v. Rohrer, 90 O. S. 167.

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Form for the commencement of an indictment

The State of Ohio, ——— county, ss.

The court of common pleas, ——— county, Ohio, of the term of ———, in the year of our Lord one thousand nine hundred and ———.

The jurors of the grand jury of the State of Ohio, impaneled, sworn, and charged to inquire of offenses committed within the said county of ———, in the name and by the authority of the State of Ohio, on their oaths and affirmations do present and find that E F, on the ——— day of ———, in the year of our Lord one thousand nine hundred and ———, in the county of ———, aforesaid.

Form for the conclusion of an indictment.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

P A, Pros. Att'y, ——— Co.

Form for a Second Count.

Second Count.

And the jurors of the grand jury of the state of Ohio, within and for the body of the county aforesaid, on their oaths aforesaid, in the name and by the authority of the state of Ohio, do further find and present, that—

Form for the commencement of an information.

The State of Ohio, ——— county, ss.

——— court, ——— term, in the year of our Lord one thousand nine hundred and ———.

J W, prosecuting attorney of the State of Ohio, for the said county of ———, now here, in said ——— court, in and for said county, in the name and by the authority, and on behalf of the State of Ohio, information given that E F, on the ——— day of ———, in the year of our Lord one thousand nine hundred and ———, in the county of ———, aforesaid.

Form for conclusion of an information.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State or Ohio.

J W, Pros. Att'y, ——— Co.

Remark.—All the forms for criminal charges contained in this work are so framed as to read in connection with the above forms for commencement and conclusion. In a few cases an alteration, which can easily be made, will be required to adjust the form of charge to the commencement here given.

Entry, on report made.

This day appeared at the bar of this court the grand jury heretofore impaneled and sworn in, and for, the body of the county aforesaid, viz.:

1. H S,
2. M. D. etc.,

and presented their certain bill of indictment against G H for burglary, indorsed "A true bill. H S, foreman of the grand jury."

And also their certain other bill of indictment against J T, for grand larceny, indorsed, "A true bill. H S, foreman of the grand jury."

(Copy report in full.)

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(When the work of the jury is completed, add:)

And there being no further business for the said jury, they were discharged finally.

Entry—Order for new recognizance at end of term

(Title.) Indictment for ———.

It being necessary to continue this case to the next term of this court, it is ordered that the said defendant do forthwith enter into a new recognizance in the amount of the present one, for his appearance at the next term of this court, to answer the charge against him; and in default thereof, that he be committed to the jail of the county.

Recognizance of accused.

The State of Ohio, v. ——— } No. ——— Court of Common Pleas.

The State of Ohio, ——— county, ss.:

Be it remembered, that on the ——— day of ———, A. D. 19—, ———, his suret—, personally appeared in open court of common pleas in and for the county aforesaid, and jointly and severally acknowledged themselves to owe the state of Ohio the sum of ——— dollars, to be levied on their respective goods and chattels, lands and tenements, if default be made in the condition following, to-wit:

The condition of this recognizance is such, that if the above bound ——— shall personally be and appear before the court of common pleas ——— then and there to answer the offense of ——— wherewith he is charged (or convicted) and abide the order and judgment of the court, and not depart without leave, then this recognizance shall be void; otherwise it shall be and remain in full force and virtue in law.

———,

———.

Taken and acknowledged in open court on the day and year first above written.

———, Clerk.

By ———, Deputy.

Sec. 13576. Disposition of person in jail and not indicted.

If a person, held in jail charged with an indictable offense, is not indicted at the term of court at which he is held to answer, he shall be discharged, unless he was committed on such charge after the discharge of the regular grand jury for such term, in which case the court may either discharge him, order a new grand jury or require him to enter into a recognizance, with sufficient surety, for his appearance before the court, to answer the charge, at the next term thereof. The person shall not be discharged if it appear to the court that a witness for the state has been enticed or kept away, or detained and prevented from attending court by sickness or unvoidable accident. (R. S. § 7211; 69 v. 168, § 87; S. & C. 1182.)

A mittimus has no force to justify a jailer in detaining a prisoner after the expiration of the term of court to which he was to answer, and if the court adjourns without a charge being filed against him, and without an order made in his case, he may be discharged on a habeas corpus. Ex parte Christmas, 1 Dec. Rep. 594, 10 W. L. J. 541.

Where a person committed to jail by an examining magistrate is not indicted by the next regular grand jury, unless for cause mentioned in this section, he is entitled to his discharge. State, ex rel., v. Lott, 5 N. P. 469, 5 O. D. 600.

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A mittimus, issued by a justice to the jailer, to receive a person into his keeping, in default of giving bail to answer a criminal charge, has no force to justify the jailer in detaining the prisoner after the expiration of the term of the court to which he was to answer for such charge. If he is longer to be detained it must be in virtue of some order of the court, made in his case.

If the court adjourns without any charge being filed against him, and without any action of the court in reference to him or his case, he is entitled to his discharge from imprisonment on a *habeas corpus*. *Ex parte* Christmas, 10 W. L. J. 541.

See also State v. Lott, 5 N. P. 469; 5 O. D. 600.

Entry—Order discharging prisoner not indicted, etc.

(Title.) Charge of ———.

No indictment having been found against this defendant, † he is hereby discharged.

Entry—Order recognizing to next term.

(Title.) Charge of ———.

(As in last to †, and continue:)—the court order that upon entering into recognizance in the sum of ——— dollars, with sufficient security for his appearance to answer the charge against him at the next term of the court, he be discharged from his imprisonment.

Journal entry where a recognizance has been filed and no indictment found.

The State of Ohio v. E. F.	Recognizance from A B, a justice of the peace, on a charge of grand larceny.

The grand jury having failed to find an indictment in this case, the defendant appeared this day, and on motion of J. S., his attorney, was discharged from his said recognizance without day.

(Or say:)

The grand jury having failed to find an indictment in this case, the defendant is discharged from his said recognizance, and he has leave to withdraw all papers on file, and no record to be made.

Sec. 13577. Grand jury finding accused insane.

If a grand jury upon investigation of a person accused of crime finds such person to be insane, it shall report such finding to the court of common pleas. Such court shall order a jury to be impaneled to try whether or not the accused is sane at the time of such impaneling, and such court and jury shall proceed in a like manner as provided by law when the question of the sanity of a person indicted for an offense is raised at any time before sentence. If such person is then found to be insane, he shall be committed to the Lima state hospital until restored to reason. This section shall not be in force and effect until the Lima state hospital is ready for the reception of inmates as certified to the courts by the governor and secretary of state. (98 v. 239, 241, §§ 12, 25; R. S. 721-12-25.)

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CHAPTER VIII.

INDICTMENT AND PROCEEDINGS THEREON.

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INDICTMENTS.

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INDICTMENTS.

Sec. 13578. Proceedings when two indictments pending against same defendant for same act.

If there be pending against the same defendant two or more indictments for the same criminal act, the prosecuting attorney must elect upon which he will proceed, and, upon trial being had upon one of them, the remaining indictment or indictments shall be quashed. (R. S. § 7212; 66 v. 301, § 88.)

Joinder.—Where several counts are for different offenses, which, however, are of the same nature, and of which the punishment is the same, there is no misjoinder, and a general verdict of guilty is good. Stoughton v. State, 2 O. S. 563.

Several distinct offenses may be joined in different counts of the same indictment, as a general rule, either where they arise out of and are connected with the same transaction or where they are connected by the same subject-matter. Where an indictment charges two or more offenses, arising out of distinct and different transactions, the court trying the cause may require the prosecutor to elect upon which charge he will proceed. Bailey v. State, 4 O. S. 440.

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Where an indictment for murder in the second degree was returned against a defendant, to which he pleaded not guilty, and on which he was convicted and sentenced, *held*, that the record of the proceedings upon a former indictment for the same homicide forms no part of the record of the proceedings on the indictment on which the defendant was convicted. Wroe v. State, 20 O. S. 460.

Where several articles of property are stolen at the same time, the transactions being the same, the whole, although they belong to different owners, may be embraced in one count of the indictment, and the taking thereof charged as one offense. State v. Hennessey, 23 O. S. 339.

Upon a trial under an indictment containing but a single count, the prosecution should be so restricted as to prevent the case from going to the jury upon evidence of more than one transaction. Where, on such trial, the state has offered evidence tending to prove several distinct substantive offenses, either of which, when duly proved, would warrant conviction, it is the duty of the court, upon motion, to require the prosecutor, before the defendant is put on his defense, to elect upon what particular transaction he will rely for conviction. Stockwell v. State, 27 O. S. 563; Bainbridge v. State, 30 O. S. 264.

On the trial of a charge of embezzlement, the fact that the money alleged to have been embezzled by the accused was received in several sums, at different times, and from different persons, affords no ground for requiring the prosecutor to elect on which sum he will rely for conviction. Gravatt v. State, 25 O. S. 162; Campbell v. State, 35 O. S. 70.

Where, in an indictment for larceny, a count is added under the provisions of § 7227, Revised Statutes, for receiving stolen property, knowing it to have been stolen, without an averment that it is the same property, the state can not be required to elect on which count it will proceed, where it appears from the description to be the same property, and no motion has been made to quash upon that specific ground. Whiting v. State, 48 O. S. 221.

Where two closely allied offenses arise from the same transaction, and may be established by substantially the same evidence, both may be included in separate counts of the same indictment. In such case an order made by the court of common pleas, compelling the prosecuting attorney to elect upon which count he will proceed to trial, deprives the state of a substantial legal right, and is erroneous, unless it appears that the defendant may be embarrassed in making some legitimate defense, if the state is permitted to proceed on both counts at the same time. State v. Bailey, 50 O. S. 636.

Receiving or concealing different articles of property at different times and on separate occasions constitute distinct offenses and can not be prosecuted as one crime, though all the property be thereafter found in the possession of the defendant at one time and place; and in such case, a conviction for a felony based on the aggregate value of all the property can not be sustained, when the value of that received or concealed on each of such occasions is less than thirty-five dollars. Smith v. State, 59 O. S. 350.

This rule is unaffected by the fact that the property was stolen by the defendant and another jointly and received or concealed in pursuance of an agreement to so commit the offense. The only effect of such an agreement is to make each party to it responsible for the crimes committed by the other in pursuance of it, whether present at their commission or not. Smith v. State, 59 O. S. 350.

In an indictment for murder containing two counts, the first charging a person with aiding and abetting, and the second charging such person with the murder jointly with the principal, it is not error to overrule a motion to compel the state to elect. Hotelling v. State, 3 O. C. 630, 2 O. C. D. 366.

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If the indictment charges four separate and distinct offenses, a motion to quash it on this ground is not the remedy of defendant. Such joinder may be made in proper cases known to the law, and if it be made to appear to the trial court that the defendant would be prejudiced by having to defend himself in one case, against several separate and distinct charges, the prosecuting attorney, on the motion of the defendant, should be required to elect upon which count or counts he would proceed. Myers v. State, 4 C. C. 570; 2 O. C. D. 712.

The question whether a prosecutor will be required to elect between different counts of an indictment is ordinarily one addressed to the discretion of the trial court, and its action thereon can not generally be assigned for error. Searles v. State, 6 C. C. 331; 3 O. C. D. 478.

Where an indictment contains several counts, each charging a criminal offense regarding property, and the record of the trial on the indictment discloses the fact that the property described in the different counts is the same, and that only one transaction was sought to be proved, a reviewing court will not presume that any prejudice resulted to the accused from the refusal of the trial court, on motion for that purpose, to require the prosecutor to elect on which of the several counts he will rely, although the indictment does not directly allege that each of said counts relates to the same property, and to but one transaction. Searles v. State, 6 C. C. 331; 3 O. C. D. 478.

On the trial of a defendant on an indictment charging him with unlawfully selling intoxicating liquors, on a day named therein, to divers persons whose names were to the grand jurors unknown, within two miles of the place where an agricultural fair was being held, the state offered evidence tending to show sales by the defendant on that day to many different persons—but the name of any such persons was not shown, nor was there any evidence of any specific sale. At the close of the evidence on the part of the state, the counsel for the defendant moved the court to require the prosecuting attorney to elect as to which of the several sales he would rely upon. This the court refused to do. The refusal was erroneous, and prejudicial to the defendant. Nickel v. State, 6 C. C. 601; 3 O. C. D. 605.

Where the alleged crime constitutes but one transaction, and the indictment contains several counts, each describing the same transaction, to meet any phase of the testimony which might be developed on the trial, this is entirely proper and in accordance with the universal practice in this state, and a motion to compel the prosecuting attorney to elect upon which count he would proceed to trial is properly overruled. Cottell v. State, 12 C. C. 467; 5 O. C. D. 472. Reversed by the Supreme Court, on the question of the defense of insanity, no other error being found. 55 O. S. 666.

Where, upon a trial on an indictment for selling intoxicating liquors as a beverage in a township where such selling is prohibited, the evidence tends to show a number of sales to different persons upon the same night, it is the duty of the court, upon motion of the defendant, at the conclusion of the testimony for the state, to require the prosecuting attorney to elect upon which sale he relies for conviction. Stick v. State, 13-23 O. C. C. 392.

An election by the prosecution will be required where evidence of distinct offenses is offered under an indictment of one count; also where separate offenses are charged in separate counts; but where such separate offenses arise out of or are connected with the same subject-matter, it is discretionary to require election. If, however, the same offense is charged in several counts to meet variations of proof, no election can be required. State v. Franzreb, 29 B. 129; affirmed by Supreme Court, 29 B. 359.

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The crime of embezzlement is not complete until the agent or servant, who has lawfully received different sums at different times, finally refuses or is unable to account for the aggregate amount; and it is not error to overrule a motion to compel the state to elect upon which item it will rely for conviction, where the indictment charges in one count the embezzlement of the aggregate sum on a particular day. Young v. State, 6 C. C. (N.S.) 53, 16 O. C. D. 747 (affirmed, 73 O. S. 372).

When the prosecutor elected upon which indictment he desired to proceed, it was the imperative duty of the trial judge (defendant here) to enter the election upon the minutes of the court without waiting to pass upon the motion to quash. State, ex rel., v. Dickson, 24 O. C. D. 635.

This section recognizes the propriety of several indictments for the same criminal act. Hence, the fact that previous indictments have not been disposed of does not afford ground for the quashing of an indictment. State v. Williams, 6 N. P. (N.S.) 406, 18 O. D. 794 (affirmed, 77 O. S. 468).

If different indictments are for the same offense the method of attack is by a plea in bar. State v. Lewis, 7 N. P. 533, 5 O. D. 552.

On an indictment containing two counts, substantially alike, a verdict of acquittal upon one, and of guilty upon the other, does not, necessarily, present such a case of repugnancy as to require an arrest of judgment. Sasser v. State, 13 O. 453.

Counts for horse stealing and grand larceny of other property may be joined in the same indictment. Barton v. State, 18 O. 221.

Where there are nine counts in an indictment charging different grades of the same offense, and connected with the same transaction, the prosecutor will not be compelled to make any election before trial. United States v. Dickinson, 2 O. F. D. 93.

Where the crime is charged in two counts, the first that the homicide was committed with deliberate and premeditated malice, and the second that it was committed in the perpetration or attempted perpetration of robbery, it is not error to overrule a motion to require the state to elect upon which count it will go to trial. Selvaggio v. State, 19 C. C. (N.S.) 88, 25 O. C. D. 139 (affirmed, 86 O. S. 366).

Duplicity.—When an offense against a criminal statute may, in the same transaction, be committed in one or more of several ways as therein provided, the indictment may, in a single count, charge its commission in any or all of the ways specified if they are not repugnant. Hale v. State, 58 O. S. 676.

A count in an indictment, in which the defendant is charged with murder while in the commission of a robbery, and in which it is alleged that the blows which caused death were struck by the defendant with a piece of iron, a sledge, and a shovel, is not bad for duplicity; the state can not be required to elect upon a trial of such count, and evidence of the robbery and the use of each of the implements in producing death is admissible. Jackson v. State, 39 O. S. 37.

The fact that the witnesses offered by the state in a criminal prosecution differ as to the date of the commission of the offense charged in the indictment, does not constitute a variance between the allegations of the indictment and the proofs, but if it appears from the whole evidence that the witnesses for the state are testifying to different transactions, the state, at the close of its evidence, may be required to elect as to which transaction it will rely upon for conviction. Angeloff v. State, 91 O. S. 361.

An indictment for incest which charges the criminal act to have been committed continuously through a specified period of years, is to be regarded as charging several distinct offenses, and is bad for duplicity. Barnhouse v. State, 31 O. S. 39.

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A count charging that B was a member of the house, and also a member of the standing committee of such house, and that a bribe was offered to influence his vote in the house and for a favorable report in the committee, is not bad for duplicity. Watson v. State, 39 O. S. 123.

An indictment for nuisance by "putting offal, filth, noxious and offensive substances" into a watercourse, does not charge more than one offense. State v. Frieberg, 49 O. S. 585.

Charging the receiving and concealing of different chattels, stolen from different owners is not bad for duplicity. Smith v. State, 59 O. S. 350.

As to an indictment which is not bad for duplicity charging an offense under the medical act, see Hale v. State, 58 O. S. 676.

An indictment charging in a single count that A "unlawfully did make an assault in and upon one B, and him, the said B, did then and there strike and wound," is not bad for duplicity. State v. Inskeep, 49 O. S. 228.

A count charging that the defendants assembled together with intent to assault one S, and in pursuance of such intent did assault, beat and wound him, is bad for duplicity. State v. McCormick, 1 Dec. Rep. 572, 10 W. L. J. 408.

An indictment charging that three defendants unlawfully made an assault upon another person, and did then and there unlawfully have carnal copulation against nature with such person, is not bad for uncertainty, repugnancy or duplicity. Foster v. State, 1 O. C. C. 467, 1 O. C. D. 261.

Where an indictment contains three counts, one count charging forgery, another charging the issuing of a false and forged instrument, the third charging the obtaining of money under false pretenses, and the state relies for conviction on the third count in the indictment, charging the obtaining of money under false pretenses, solely upon the fact that the check presented to the bank for payment was a forged instrument, and that the defendant either having forged the same or knowing it to have been forged, presented it for payment, and the jury finds that the defendant is not guilty of forgery and not guilty of issuing a false and forged instrument, it should return a verdict of not guilty of obtaining money under false pretenses. Griffith v. State, 93 O. S. 294.

A separate count charging each crime may be contained in one indictment, but upon the trial of such indictment the court should instruct the jury that the accused can not be found guilty of both crimes in reference to the same money or property. The rule is the same where these crimes are charged in separate indictments, and if it appears from the evidence that the state has theretofore procured conviction for the embezzlement of money, the accused can not be found guilty upon a second indictment of obtaining the same money by false pretenses. Griffith v. State, 93 O. S. 294.

A demurrer to a plea in bar to an indictment should be sustained where it appears from the plea that the offense charged in the indictment and the offense of which the defendant claims to have theretofore been acquitted, convicted or pardoned is not the same offense. Griffith v. State, 93 O. S. 294.

In the trial of an accused upon an indictment charging the obtaining of money under false pretenses it is error to exclude evidence tending to prove that the defendant had theretofore been convicted of embezzlement of the same money or property that is alleged in the indictment to have been procured by false pretenses. The record of the former indictment and proceedings had thereunder is competent evidence tending to show a former conviction of embezzlement of the same funds; in addition thereto the defendant must show by further evidence that he is the

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same person named in the former indictment, that the transaction is the same and the funds identical. Griffith v. State, 93 O. S. 294.

The fact that the money alleged to have been embezzled by the accused was received in several sums, at different times, and from different persons, affords no ground for requiring the prosecutor to elect on which sum he will rely for conviction. Gravatt v. State, 25 O. S. 162; Campbell v. State, 35 O. S. 70.

Embezzlement is not complete until the agent, who has received sums at different times, finally refuses or is unable to account for the aggregate amount, and the state need not elect upon which item it will rely for conviction where the indictment charges in one count the embezzlement of the aggregate sum on a particular day. Young v. State, 6 C. C. (N.S.) 53, 16 O. C. D. 747 (affirmed, 73 O. S. 372).

In a prosecution for the violation of the liquor laws, an affidavit is not bad for duplicity which charges not only that the accused kept and used a wagon for the selling, furnishing and giving away of intoxicating liquors as a beverage, but also that from it he sold, furnished and gave away such liquors. Cohen v. State, 16 C. C. (N.S.) 178.

When one, who has been indicted two or more times for the same criminal act, moves for an election and also to quash all the indictments against him, he may abandon temporarily or permanently his motion to elect and press the motions to quash. An accused has the right at all times before demurring or pleading in bar or the general issue, to destroy, if possible, all the indictments against him by motions to quash and pleas in abatement, and thus prevent the necessity of an election by the state; and when such an one has thus abandoned his motion to elect, the state has not the right to exercise its election under that motion without the consent of the accused, and especially is this so when the purpose of the state is to reserve one of the indictments for future use in the event the first be set aside by the court. State v. Cox, 11 N. P. (N.S.) 305, 21 O. D. 535 (exceptions sustained).

Three counts in an indictment for obtaining property under false pretenses are not inconsistent or repugnant, the first of which charges that it was falsely represented that Snyder owned property on the lake shore east of Cleveland, the second that Pollock owned property on the lake shore east of Cleveland, and the third that Snyder and Pollock jointly owned certain property, describing it, on the lake shore east of Cleveland, the title being in Pollock with authority from Snyder to convey. Golner v. State, 10 C. C. (N.S.) 571.

Where distinct offenses are charged in the counts of an indictment, a motion to quash is not proper, but a motion to require the prosecutor to elect may be sustained. Myers v. State, 4 C. C. 570, 2 O. C. D. 712.

The presumption is that different counts in the same indictment are merely different ways of charging the same offense in order to meet the evidence. Myers v. State, 4 C. C. 570, 2 O. C. D. 712.

A count charging murder in the first degree, where the killing was done in attempting to perpetrate a robbery, is not bad for duplicity on the ground that in the same count it charges an assault with intent to rob, since such averments are essential in murder. Blair v. State, 5 C. C. 496, 3 O. C. D. 242.

Where the record discloses that the property described in the different counts in an indictment is the same property, and that only one transaction was sought to be proved, a reviewing court will not presume any prejudice resulted to the accused because the prosecutor was not required to elect, although the indictment does not directly allege that each of said counts related to the same property and to one transaction. Searles v. State, 6 C. C. 331, 3 O. C. D. 478.

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Where the same offense is charged in several counts to meet variations of the evidence, no election will be required. State v. Frantzreb, 2 O. D. 493.

It is not error to overrule a motion to dismiss prosecution for libel on the ground that another affidavit is pending in the same court between the same parties upon the same complaint, nor is it error to require the state to elect between the affidavits. Bates v. State, 17 N. P. (N.S.) 193.

The identical words of a statute need not be used in an indictment charging an offense in violation of it, but it is sufficient if the offense charged is brought substantially within the provisions of the statute defining it. Murray v. State, 23 C. C. (N.S.) 508.

Upon a trial under an indictment containing but a single count, the prosecution should be so restricted as to prevent the case from going to the jury upon evidence of more than one transaction. Stockwell v. State, 27 O. S. 563.

Entry—Order for election between two indictments.

(Title.) Indictment for ———.

It appearing to the court that there are pending against this defendant two indictments for the same crime, it is ordered that the prosecuting attorney elect upon which he will proceed to trial.

Entry of election.

(Title.) Indictment for ———.

Now comes the prosecuting attorney, in accordance with the former order of the court, and elects to proceed to trial against this defendant upon the indictment filed in this case, to-wit, that of ———.

If the election is made at the time of the order, the entry may be as follows:

Entry of order and election.

(Title.) Indictment for ———.

Now comes the prosecuting attorney, and it appearing that there are pending against this defendant two indictments for the same crime, and the said prosecuting attorney being required to elect upon which indictment he will proceed to trial, elects to proceed upon that of ———, as filed in this case.

Sec. 13579. Where person may be indicted for receiving stolen property.

When a person is liable to prosecution as the receiver of personal property which has been feloniously stolen, taken, obtained or embezzled, he may be indicted in any county where he received or had such property, notwithstanding the theft was committed in another county. (R. S. § 7213; 66 v. 301, § 89.)

For citations and forms see § 12450.

In an indictment under G. C. § 12450, for receiving stolen goods, an intent to defraud is sufficiently alleged by the use of the words "unlawfully and fraudulently." Rosenbloom v. State, 19 C. C. (N.S.) 23.

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Sec. 13580. Where certain offenders to be tried and punished.

Whoever, with firearms, or by sending poison or other thing or by other means, kills or injures a person in another state or county, or whoever gives a mortal blow to a person who dies in another state or county, shall be tried and punished in the county where such offender was at the time such poison or other thing was sent, or the force was used. (R. S. § 7214; 33 v. 33, § 37; S. & C. 416.)

Sec. 13581. What defects in an indictment are not fatal.

An indictment shall not be invalid, and the trial, judgment or other proceeding stayed, arrested or affected by the omission of the words "with force and arms," or words of similar import, or the words "as appears by the record"; or for omitting to state the time at which the offense was committed, in a case in which time is not of the essence of the offense; or for stating the time imperfectly; or for want of a statement of the value or price of a matter or thing or the amount of damages or injury, where the value or price or the amount of damages or injury is not of the essence of the offense; or for the want of an allegation of the time or place of a material fact, when the time and place have once been stated therein; or that dates and numbers are represented by figures; or for an omission to allege that the grand jurors were impaneled, sworn or charged; or for surplusage or repugnant allegation when there is sufficient matter alleged to indicate the crime and person charged; or for want of averment of matter not necessary to be proved; or for other defects or imperfections which do not tend to prejudice the substantial rights of the defendant upon the merits. (R. S. § 7215; 66 v. 301, § 90.)

Object of section.—This section has relation to the form of the indictment and the manner of describing the offense. Barnhouse v. State, 31 O. S. 39.

This section applies to affidavits and informations in police courts, as well as to indictments. Neified v. State, 3 C. C. (N.S.) 551, 13 O. C. D. 246.

The provision of this section, as to defects in an indictment which shall not be regarded as fatal, does not apply to the case of one who has been convicted of an infamous crime without having been arraigned on the indictment or having entered a plea thereto, and such an omission constitutes reversible error. Emmons v. State, 14 C. C. (N.S.) 351, 23 O. C. D. 516.

Time.—It is unnecessary to prove the particular time as laid, unless the time be material. On an indictment laying a particular day when the plaintiff acted as an officer of an unauthorized bank, it is competent for the prosecution to prove the act after the day laid. Brown v. State, 11 O. 277.

Where there are several counts in an indictment, it is no valid ground of objection that they differ in stating the time of the commission of the crime or offense charged; nor is a verdict inconsistent which finds the defendant guilty under several counts in which the time is differently stated. Griffin v. State, 18 O. S. 438.

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Where there are several counts in an indictment, in the first of which the time and place are specifically stated, it is sufficient to allege, in the subsequent counts, that the offense therein described was then and there committed. Evans v. State, 24 O. S. 208.

Permitting the prosecuting attorney to insert the date of the commencement of the term of court at which the indictment was found is an immaterial amendment and does not affect the validity of the indictment. Smith v. State, 4 Dec. Rep. 48, Clev. L. Rec. 62.

In an indictment for burglary charging the crime to have been committed on a certain day "in the night season of the same day, to-wit, about the hour of two o'clock at night," the allegation as to time is sufficiently distinct and certain. Methard v. State, 19 O. S. 363.

Where, in a prosecution for the unlawful sale of liquor in a residence district, the affidavit charges that the defendant kept certain places from a certain date and at various times until a certain other date, the period being one week, although such affidavit is somewhat vague as to the "when" and "where" of the offense, yet it charges one offense and the defendant is not prejudiced by it. Otte v. State, 9 C. C. (N.S.) 293, 19 O. C. D. 203.

Where the offense of keeping a disorderly house is charged with a continuando, no specific time need be alleged. Brown v. State, 7 N. P. 435, 5 O. D. 210.

Surplusage.—Where an indictment for robbery avers an actual stealing of bank-notes, and contains a particular description of the bank-notes taken, but erroneously avers them to be "money, goods and chattels," these words may be rejected as surplusage, and the indictment will be good. Turner v. State, 1 O. S. 422.

Concealment is not a necessary or essential element of the crime of buying stolen goods, defined by the 26th section of the crimes act (1 S. & C. 412); and, if alleged in the indictment, it is surplusage, and need not be proved. Holtz v. State, 30 O. S. 486.

If one offense is well charged in an indictment, and another offense, in the same count, is ineffectually charged, either for want of certainty as to time or otherwise, the averments as to the latter may be rejected as surplusage. But if both offenses are effectually charged, the count will be bad for duplicity. Barnhouse v. State, 31 O. S. 39.

An indictment which charges that the accused on a specified day received and concealed different chattels which had been stolen from different owners, is not bad for duplicity. Smith v. State, 50 O. S. 350.

An indictment against a sheriff for failing to account for fees received during the quarter (G. C. § 12889), sufficiently describes the offense as having been committed on the "1st day of April, 1908," and where the words "first Monday in April, 1908," are added, by virtue of this section, their presence does not invalidate the indictment. State v. Van Gunten, 84 O. S. 170.

An indictment is not bad solely because it contains surplusage, nor is it indefinite if it affords the accused protection in his legal rights in making a defense and also furnishes him a record of conviction or acquittal that he may interpose if indicted a second time for the same offense. Goode v. State, 17 C. C. (N.S.) 195.

In a trial for unlawfully exhibiting obscene, lewd and lascivious figures, etc., the court charged that the words "obscene," "lewd" and "lascivious" were to be taken and construed together, as charging a single offense and to be considered in their ordinary signification and in their popular sense. He also, in defining said words separately, gave synonyms of them approved by lexicographers, some of which synonyms do not possess the precise content or meaning which the entire

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phrase carries. It was held that this was not reversible error. Goode v. State, 17 C. C. (N.S.) 195.

In an indictment under G. C. § 12823, the accused may be charged with soliciting a bribe and accepting a bribe in one count, even though G. C. § 12823 provides that the offense of bribery may be committed in various ways, which are stated disjunctively and among which are soliciting a bribe and accepting a bribe. State v. Baschang, 24 O. D. 628, 9 O. L. R. 11.

In an indictment wherein the defendant is legally charged with receiving and concealing stolen property, knowing the same to have been stolen, which allegations are followed by the language "and so the jurors aforesaid upon their oaths and affirmations aforesaid, do say that the said Harvey Schultz then and there in manner and form aforesaid, unlawfully did conceal, take and carry away the said personal property," such latter allegation is wholly irrelevant and ineffectual to either help or hurt the former charge of the indictment. It is at most a legal conclusion and should be regarded as surplusage under and by virtue of section 13581, General Code. State v. Schultz, 96 O. S. 114.

Repugnant allegations.—On an indictment containing two counts, substantially alike, a verdict of acquittal upon one and of guilty upon the other, does not, necessarily, present such a case of repugnancy as to require an arrest of judgment. Sasser v. State, 13 O. 453.

By the Court: There seems also to be a repugnancy in the count. It is first averred that the instrument is a false and forged receipt for money. By a subsequent averment the same instrument is described as a receipt for money, issued in fact by E H & Co. to the draft clerk in their bank. But any objection on this ground is, perhaps, obviated by the criminal code, which provides that no indictment shall be deemed invalid "for any surplusage or repugnant allegation, when there is sufficient matter alleged to indicate the crime or person charged." Henry v. State, 35 O. S. 128.

A general verdict of "guilty" is not bad for repugnancy on a trial under an indictment for foeticide containing two counts, one death by an instrument, and the other by drugs. Tabler v. State, 34 O. S. 127.

An indictment, the first count of which charges the accused as principal with the burning of a building in 1804, and the second count charges him with aiding and abetting another in the same crime in 1894, is not bad for duplicity and indefiniteness. Van Immons v. State, 12 C. C. (N.S.) 417, 19 O. C. D. 681 (affirmed, without report, 72 O. S. 678.)

When an accused has been tried for abortion charged in two counts and found guilty upon one and not guilty upon the other, upon his second trial after reversal of the first judgment, it is not error to admit evidence as to his guilt under the charge as to which he was found not guilty at the first trial. Geer v. State, 16 C. C. (N.S.) 151.

Where a statute declares the doing of any one of several things to be practicing medicine, an indictment which charges the accused with having done all of them is not bad, and he may be found guilty, if the evidence at the trial establishes the fact that he did any one of them. Triplett v. State, 23 C. C. (N.S.) 172.

A count in an indictment is not rendered invalid by reason of a reference to a statement contained in a previous count without repeating the matter contained in such statement; and should it happen that the previous count is defective and is rejected for that reason, the remaining count may be sustained if the reference be sufficiently full to incorporate the matter going before. Foster v. United States, 9 O. L. R. 66.

Negative averments.—When a criminal or penal statute contains an exception in the enacting clause, that exception must be negatived in the indictment; but where the statute contains provisos and exceptions in distinct clauses, it is not necessary to allege that the defendant does not come within the exceptions nor to negative the provisos. Hirn v. State, 1 O. S. 15.

Where an exception or proviso in a criminal statute is a part of the description of the offense, it must be negatived by averment in the indictment in order to fully state the offense; but when its effect is merely to except specified acts or

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persons from the operation of the general prohibitory words of the statute, the negative averment is unnecessary. Hale v. State, 58 O. S. 676.

Every indictment should contain a complete description of the offense charged, and must in all cases contain the negative averment if the matter of such exception enter into and become a part of the description of the offense. Corthell v. State, 11 C. C. 570, 5 O. C. D. 123.

It is not necessary that the negative averments of § 1642, General Code, relating to jurisdiction over and with respect to delinquent and dependent and neglected minors, shall be incorporated in the affidavits under which arrests are made. Walton v. State, 3 O. A. R. 97, 19 C. C. (N.S.) 452.

Where a statute declares a certain act to be a crime or offense, but specifies some exceptions to the rule, a negative averment in the indictment or information, that the act charged does not come within any one of such exceptions, will be required where without such negative averment, the description of the crime or offense charged would not be complete. But where there is a subsequent exemption, or one occurring in a separate or distinct clause or part of the statute disconnected with the statutory description of the offense, the negative averment is unnecessary. Kowenstrot v. State, 4 N. P. 257, 6 O. D. 467.

Prejudicial defect or imperfection.—An indictment designating the accused by initial letters, as a baptismal name, is good after verdict. Smith v. State, 8 O. S. 294.

In the police court of Cincinnati the defendant filed a plea setting forth matter of defense merely; the judge, without passing upon this plea, directed a plea of not guilty to be filed, the accused standing mute, and proceeded with the trial. By the Court: Upon the trial, evidence was heard going to establish the averments of the plea which defendant had filed, and if no result could have followed from hearing the testimony under the plea of not guilty, different from that which would have followed if heard under the plea defendant did file, we do not see as there could have been any error "affecting materially his substantial rights." Billigheimer v. State, 32 O. S. 435.

Where the charge is burglary by breaking into the car of a railroad company, designated by its corporate name, but the indictment contains no averment that the company was incorporated, the accused can not avail himself of the defect, if defect it be, in view of the code of criminal procedure. Burke v. State, 34 O. S. 79.

In an indictment for burglary by breaking into the office of a railroad company, there was no allegation that the company was incorporated. Held, that it was not sufficient ground for sustaining a motion to quash. Hamilton v. State, 34 O. S. 82.

An indictment charging that the prisoner broke into a store-room is insufficient under a statute making it an offense to break into a "store-house;" the defect is not one of form, but of substance, and is available, although the objection is not made until the verdict has been rendered. Hagar v. State, 35 O. S. 268.

By the Court: The indictment in this case is bad on two grounds; 1. ———. 2. The goods which the accused is alleged to have obtained are not sufficiently described. As to the second ground. The particular time laid in the indictment is not material, nor is it necessary that the goods should be of the value stated. The only description of the goods, therefore, contained in the indictment, is "a certain lot of dry goods;" and the question is whether this description is sufficient. We think it is not. We are aware that under the code of criminal procedure no indictment is to be deemed invalid for any "defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits." But we

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are not prepared to say that such a lumping, indefinite description of the goods as is here laid does not tend to the prejudice of the accused. Redmond v. State, 35 O. S. 81.

In an indictment for larceny it was alleged that the stolen chattels were the property of the P. C. & St. L. Ry. Co., the "company then and there being a body corporate;" but no direct evidence was offered that the company was incorporated. Held, that the want of such evidence afforded no ground for a new trial. Murphy v. State, 36 O. S. 628.

An indictment contained three counts; the first and second did not charge the offense to have been committed "against the peace and dignity of the State of Ohio," but the third did so charge. The accused was acquitted under the first two counts and convicted under the third. Held, that where it did not appear from the record that evidence had been introduced against the prisoner under the first two counts which would have been incompetent under the third, and prejudicial, there was no error in refusing to grant a motion for a new trial. Ridenour v. State, 38 O. S. 272.

Sufficiency of an averment as to time in an indictment for burglary; what constitutes the night season of a specified day. Methard v. State, 19 O. S. 363.

The indictment must state every circumstance of intention, knowledge, or action that constitutes the crime. Anderson v. State, 7 O. (2 pt.) 250; Stoughton v. State, supra.

See Mackey v. State, 3 O. S. 362; Davis v. State, 19 O. S. 270.

Indictment for stealing bank bills must aver a scienter, or it is defective. Gatewood v. State, 4 O. 386.

It is a well settled rule of criminal pleading, that an indictment must aver, with reasonable certainty, all the material facts which are necessary to be proven to procure a conviction. Ellars v. State, 25 O. S. 385, 388.

An indictment for manslaughter, which avers that defendant did unlawfully kill and slay another, while the slayer was in the commission of an unlawful act—i. e., the act of using instruments and drugs upon the person of a woman, with intent to procure an abortion—without averring that death was occasioned by the use of such instruments or drugs, is a sufficient indictment for manslaughter. State v. Barker, 28 O. S. 583.

If on trial it should appear that the death was in consequence of such unlawful attempt to procure an abortion, the offense would not be manslaughter, but the one described in the second section of the abortion act (S. & S. 272). Ib.

On an indictment for robbery, if the indictment contains a particular description of bank notes taken, but erroneously avers them to be "no money, goods and chattels," these words may be rejected as surplusage, and the count will be good. Turner v. State, 1 O. S. 422.

Indictment held good. State v. Freiberg, 49 O. S. 585.

An indictment for voting more than once at the same election (§ 7050, Revised Statutes), is fatally defective if it fails to designate the election at which the defendant voted. Lane v. State, 39 O. S. 312.

Where, in an indictment for obtaining goods by false pretenses, the only description of the property is "a certain lot of dry goods," the description is insufficient. Redmond v. State, 35 O. S. 81.

Indictment—when bad. State v. Trisler, 49 O. S. 583.

Omission to aver venue is fatal. Knight v. State, 54 O. S. 365.

An indictment charging the forgery with intent to defraud of an instrument as follows: "J. B. Vail, 322 Market St., Office, 125 West Market St. Please give bearer coat and oblige J. B. Vail," does not charge a crime unless there are averments of

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an extrinsic character, showing wherein the order was fraudulent. Moore v. State, 13 C. C. 10; 7 O. C. D. 70.

For the above is not an order for the delivery of goods within § 7091. Id.

An indictment under § 2926w of the election laws, for falsely and fraudulently obtaining registration, alleging as the only representation made, "that he represented to the registrators that he was then a qualified elector of precinct 'A,' the third ward, in said city of Findlay, Ohio, and thereby falsely, fraudulently and unlawfully did obtain registration in said precinct," is demurrable. Ebbenpowell v. State, 14 C. C. 129; 7 O. C. D. 572.

Though it is safer, as a general rule, to use the identical words of the statute which are descriptive of the offense, it is not essential, provided others of similar import are employed. Spencer v. State, 13 O. 401, 406; Poage v. State, 3 O. S. 229; Dillingham v. State, 5 O. S. 280; Stoughton v. State, 2 O. S. 562; Hagar v. State, 35 O. S. 269.

An indictment must pursue the words of the statute substantially in setting out the offense since with us there are no common law crimes. Van Valkenburg v. State, 11 O. 404.

An indictment, however, that simply follows the language of the statute may be defective, since in many cases something more is required. Lamberton v. State, 11 O. 282; Hagar v. State, 35 O. S. 268.

If the statute does not use sufficient words to definitely describe the offense, following its exact language is not sufficient. Groenland v. State, 4 N. P. 122, 6 O. D. 313.

Charging that A did "obstruct and abuse" an officer is not sufficient, although the exact language of the statute has been employed. Aylmore v. State, 11 Dec. Rep. 900, 30 Bull. 376.

Under the present rules for pleading in criminal cases, which require reasonable certainty only in an indictment, the fact that the pleader might have been a little more explicit in his statement as to why the instrument alleged to have been used in committing the homicide could not be more fully described, does not constitute ground for quashing the indictment. Lynch v. State, 23 C. C. (N.S.) 230.

Defects and imperfections in pleading which do not prejudice the substantial rights of the accused on the merits do not invalidate the indictment. Lynch v. State, 23 C. C. (N.S.) 230.

Error, to be ground of reversal, must be prejudicial to the rights of the party complaining. McHugh v. State, 42 O. S. 154.

The theory that each count of an indictment charges a separate offense is a legal fiction, but defendant can not claim the benefit of the fiction without bearing its burdens. Brown v. State, 18 O. S. 496.

Where an indictment charged the embezzlement of numerous articles of property, and alleged an aggregate value thereof, it was competent for the state to prove the embezzlement of any one or more of the articles of property charged, and the value of the same, although the value of each article of property was not separately stated in the indictment. State v. Mook, 40 O. S. 588.

Concealment is not a necessary or essential element of the crime defined by the twenty-sixth section of the crimes act (1 S. & C. 412), and if alleged in the indictment, it is surplusage, and need not be proved. Holtz v. State, 30 O. S. 486.

By a plea of guilty, the defendant waives the right to object to any defects that might have been taken advantage of by a motion to quash, or by a plea in abatement. After such plea, such matters only as may be taken advantage of, by a motion in arrest of judgment, can be interposed to prevent sentence. Carper v. State, 27 O. S. 572.

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An indictment charging the burning of the property of "the Board of Education of Amherst township," when the only legal designation of that body was "The Board of Education of the Township District of Amherst," is good in the absence of the court's acting under § 7216. Gawn v. State, 13 C. C. 117; 7 O. C. D. 19.

An objection that the copy of the indictment served upon the defendant is not a true one, must be made before going to trial. Case v. State, 12 C. C. 159; 5 O. C. D. 194.

It is a well settled rule of criminal proceedings that, in all statutory offenses, the indictment must pursue the words of the statute substantially in setting out the offense. With us there is no such thing as common-law crime. Vanvalkenburg v. State, 11 O. 404.

See also Sutcliffe v. State, 18 O. 469; Sharp v. State, 19 O. 379.

Every indictment should contain a complete description of the offense charged. It should set forth the facts constituting the crime, so that the accused may have notice of what he is to meet; of the act done, which it behooves him to controvert, and so that the court, applying the law to the facts charged against him, may see that a crime has been committed. Lamberton v. State, 11 O. 282.

In an indictment for burglary, it is sufficient to lay the ownership of the house in a married woman who lives apart from her husband, and has the occupancy and control of the dwelling. Ducher v. State, 18 O. 308; see also Huling v. State, 17 O. S. 583.

Where a greater punishment may be inflicted on a conviction for a second or subsequent violation of a criminal law than for the first, the fact that the offense charged is a second or subsequent offense must be averred in the indictment or information, in order to justify the increased punishment. Larney v. Cleveland, 34 O. S. 599.

A general verdict of "guilty" is not bad for repugnancy on a trial under an indictment for foeticide containing two counts, one death by an instrument, and the other by drugs. Tabler v. State, 34 O. S. 127.

An indictment for false pretenses can not be founded upon an assertion of an existing intention, although it did not in fact exist; there must be a false representation as to an existing fact. Winnett v. State, 18 C. C. 515; 10 O. C. D. 245. Affirmed, 43 W. L. B. 248.

When a criminal or penal statute contains an exception in the enacting clause, that exception must be negatived in the indictment; but where the statute contains provisos and exceptions in distinct clauses, it is not necessary to allege that the defendant does not come within the exceptions nor to negative the provisos. Hirn v. State, 1 O. S. 15.

Where it appears from the caption of an indictment and other parts of the record, that a prosecution has been "carried on in the name, and by the authority, of the State of Ohio," in a specified county of the state, and the offense is charged to have been committed in the county, the failure to allege that the county is in the State of Ohio is not a sufficient ground for the arrest of judgment. Foster v. State, 19 O. S. 415.

This statute does not apply to the case of one charged with presenting a false and fraudulent claim to the county commissioners and obtaining payment thereof from the county treasurer. DuBruhl v. State, 80 O. S. 64.

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An indictment, the first count of which charges the accused as principal with the burning of a building in 1804, and the second count charges him with aiding and abetting another in the same crime in 1894, is not bad for duplicity and indefiniteness, inasmuch as the date of the first count was clearly a mistake; and no substantial right of the accused having been prejudiced, a motion to quash was rightly overruled. Van Immons v. State, 12 C. C. (N.S.) 417 (affirmed by Supreme Court without opinion, 72 O. S. 678).

A count in an indictment in which the defendant is charged with robbery and with murder while in the commission of the robbery, and in which it is alleged that the blows which caused death were struck by the defendant with a piece of iron, a sledge and a shovel, is not bad for duplicity. Jackson v. State, 39 O. S. 37.

A single count in an indictment under § 6900, Revised Statutes, which charged that B was a member of the house of representatives of the general assembly of the state, and also a member of a standing committee of such house, to which a bill was referred, and that the offer or promise was made to influence his vote therefor in the house, and his vote for a favorable report thereon in the committee, is not bad for duplicity. The charge thus made constitutes but one offense under the statute. Watson v. State, 39 O. S. 123.

An averment in such indictment (under the act "to regulate the practice of medicine in the State of Ohio," 92 O. L. 44), that the defendant, at a time more than ninety days after the passage of the statute, practiced medicine in the county of his residence without having left with the probate judge of the county a certificate of the state board of medical registration and examination, is sufficient to show a failure to comply with the provisions of the statute. It is unnecessary to aver, either that the defendant was not a graduate of a medical college, or that he was not a legal practitioner of medicine when the statute was enacted. Hale v. State, 58 O. S. 676.

An indictment drawn under the act "to regulate the practice of medicine in the State of Ohio" (92 O. L. 44), which charges that the defendant, without having complied with the provisions of the act, for a fee prescribed, directed and recommended for the use of a person named, a drug medicine, and agency, put up in a paper box on which he wrote directions to which he signed his name and appended thereto the letters "M. D." is not bad for duplicity. Hale v. State, 58 O. S. 676.

The constitution requires that all indictments shall conclude with the words "against the peace and dignity of the State of Ohio," but those words are not required to be at the conclusion of each count of an indictment. Olendorf v. State, 64 O. S. 118.

It is not necessary under our statutes that the prosecuting attorney should sign the indictment. But even if necessary, the omission would be cured by § 7215, Revised Statutes, and would not be a good ground for setting aside the verdict. Jones v. State, 14 C. C. 35; 7 O. C. D. 305.

A mistrial should not be ordered in a cause simply because some error has intervened. The error must prejudicially affect the merits of the case and the substantial rights of one or both of the parties, and this is as true of the temporary absence of the judge as any other departure from due process of law during the trial of a cause. Tingue v. State, 90 O. S. 368.

The word "obtain," as used in § 13104, General Code, is not limited to getting, securing or appropriating money or property as owner. It includes as well the getting or securing of money or property by way of a loan. Tingue v. State, 90 O. S. 368.

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In a trial for arson where the indictment charged the accused with burning the property of "B Mirsky," and the evidence showed that it was owned by "Harry Mirsky," it is not error for the court to charge that if the jury found that the person named in the indictment as "B. Mirsky" was the same person as the "Harry Mirsky" who owned the building, the variance would not be fatal. Berman v. State, 16 C. C. (N.S.) 106 (affirmed, 81 O. S. 508.)

The provision of § 13581, as to defects in an indictment which shall not be regarded as fatal, does not apply to the case of one who has been convicted of an infamous crime without having been arraigned on the indictment or having entered a plea thereto, and such an omission constitutes reversible error. Emmons v. State, 14 C. C. (N.S.) 351, 23 O. C. D. 516.

A conviction for receiving stolen property will not be set aside because the evidence received at the trial tended to prove the receipt of several similar pieces of stolen property at about the same time as those for the receiving of which the defendant was on trial, without making it certain which of the several pieces were the ones upon which the prosecution was based. Krause v. State, 23 C. C. (N.S.) 558.

Mere matter of unnecessary particularity or immaterial description contained in an indictment is not sufficient upon which to base a charge of variance between pleading and proof. Such variance must be based upon some essential element of the offense or some essential part of such element. Tingue v. State, 90 O. S. 368.

The misspelling of the name of the defendant in the indictment under which he was tried does not present a question which can be raised on a motion for arrest of judgment. Smile v. State, 1 O. A. R. 402, 17 C. C. (N.S.) 500 (affirmed by Supreme Court).

In an indictment charging the solicitation of a bribe, it is necessary for the state to plead and prove the specific corrupt intent required by the statute, to-wit, "to influence him with respect to his official duty, action, vote," etc. State v. Davis, 90 O. S. 100.

In a criminal case a general demurrer under G. C. § 13623, raises the question of whether intent has been alleged, and proof of it is necessary to make out the offense charged. Rosenbloom v. State, 19 C. C. (N.S.) 23.

It is unnecessary to charge criminal intent in an indictment under a statute which does not make intent an essential element of the offense defined in the statute. State v. Henkel, 11 N. P. (N.S.) 97, 22 O. D. 735.

The constitution requires that all indictments shall conclude with the words "against the peace and dignity of the state of Ohio," but those words are not required to be at the conclusion of each count of an indictment. Olendorf v. State, 64 O. S. 118; see, also, Ridenour v. State, 36 O. S. 272.

The rules of criminal practice require that an indictment charging the sale of an obscene, lewd and lascivious photograph should set forth a copy thereof, or give such a description as decency permits and aver that the photograph is too obscene for further description or recital. Charville v. State, 6 O. A. R. 236.

An indictment for this offense, which does not give a copy of the obscene photograph, or an excuse for its omission, is defective, but such defect is within the curative provisions of section 13581, General Code, and a judgment of conviction will not be reversed where such defect does not prejudice the substantial rights of the defendant on the merits. Charville v. State, 6 O. A. R. 236.

The defendant in a criminal cause who desires to object to an indictment because of defects apparent upon the face of the record, relating to the form or manner in which an offense is charged, must do so by a motion to quash. By demurring, pleading in bar, or by pleading to the general issue, he is held to have waived the defects which might be taken advantage of by a motion to quash. State v. Schultz, 96 O. S. 114.

An indictment that charges in the same count both receiving and concealing property, knowing the same to have been stolen, is not bad for duplicity. (Hale v. State, 58 Ohio St. 676, approved and followed.) State v. Schultz, 96 O. S. 114.

Section applies to affidavits in police court.—Section 7215, Revised Statutes, enumerating what defects in an indictment are not fatal, and which provides that any defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits, is not fatal, applies to an affidavit or information in the police court. Neifeld v. State, 13-23 C. C. 246.

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An affidavit or information charging the proprietor of a junk shop with "failure to retain the metal for thirty days," as required by § 4413, Revised Statutes, substantially charges that he did not retain it, and is sufficient to notify the defendant of the offense with which he is charged; he is not prejudiced in his substantial rights thereby because the provision of the statute is not negative. Neifeld v. State, 13-23 C. C. 246.

It is not necessary in an affidavit charging the sale of adulterated maple syrup to set out in full a copy of the label on the package, but it is sufficient to state that it had on it the word "maple." Scanlon v. State, 16 C. C. (N.S.) 115.

Sec. 13582. What is variance.

When, on the trial of an indictment, there appears to be a variance between the statement in such indictment and the evidence offered in proof thereof, in the Christian name or surname, or both or other description of a person therein named or described or in the name or description of a matter or thing therein named or described, such variance shall not be ground for an acquittal of the defendant, unless the court before which the trial is had, finds that such variance is material to the merits of the case or may be prejudicial to the defendant. (R. S. § 7216; 66 v. 301, § 91.)

Construction of section.—This section abrogates, in our state, the rule of evidence on the subject of variance, in matters of description, between the allegation and proof. Instead of looking to the rules of evidence to ascertain whether there is a variance between the allegations of the indictment and the evidence offered, the court now looks at the case as it stands before it; and if there are variances between the allegations and the proof offered, the defendant, for that reason alone, must not be acquitted, unless in the opinion of the court, the variance is material, or may be prejudicial to the defendant. The opinion of the court, in this respect, is now substituted for the former rule of evidence on the subject. Lytle v. State, 31 O. S. 196.

Opinion of court.—As the ruling of the court upon the admission or rejection of testimony, under the former rule of evidence on the subject of variance was reviewable on error, so may the opinion of the court as to whether the variance is material or prejudicial to the defendant, in like manner, be reviewed on error. Lytle v. State, 31 O. S. 196.

A variance between the charges of the indictment and the proof offered, which, in the opinion of the judge presiding at the trial, did not affect the rights of the prisoner or prejudice his case, is not ground for reversal in a court of error, where it does not appear that discretion has been abused. Tarbox v. State, 38 O. S. 581.

A decision of the trial judge on a question as to the materiality of a variance between an allegation of an indictment and the evidence offered in its support may be reversed, if erroneous and prejudicial to the accused, and it may be the subject of an exception by the prosecuting attorney with a view to obtaining a decision which shall determine the law for the government of similar cases. State v. Buechler, 57 O. S. 95.

Variance.—On an indictment charging two persons with the commission of a joint offense, both can not be convicted upon proof that each one committed an act constituting an offense similar to the act charged in the indictment. Stephens and Everett v. State, 1 O. 386.

When, on a trial for forgery, a variance is alleged between the name of the forged instrument and the name appearing in the indictment, if the variance is plain, such instrument ought not to be allowed to go in evidence; but if the forged name is uncertain, and susceptible of being read as agreeing with the name stated in the indictment, it is not error for the court to submit the question to the jury. Turpin v. State, 19 O. S. 540.

Where an indictment charged the defendant with stealing a *silver* teapot and other named articles of *silver*-ware, and the evidence on the trial showed that the articles stolen were *plated*-ware, consisting of only one twenty-fifth part silver, and

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there was no finding of the court, or evidence, showing that the variance was material to the merits of the case, or prejudicial to the defendant. *Held*, that the variance was not fatal, and the defendant was properly convicted, there being a good legal description of the articles stolen after the false word "silver" is rejected. Goodall v. State, 22 O. S. 203.

On the trial of a defendant charged with causing a building owned by him to be burned, with intent to defraud the insurer of such building, a variance between the allegations of the indictment descriptive of the insurer of such building, and the proof given in support thereof, unless such variance is found to be material to the merits of the case, or to have the effect to prejudice the accused, does not entitle him to an acquittal. Evans v. State, 24 O. S. 458.

Where, in an indictment for burglary and larceny, the ownership of the building entered and of the goods and chattels stolen, is laid in two or more persons, and, on the trial, it appears from the evidence offered by the state, that the building and goods and chattels are the property of one of the persons named only, such variance will not be deemed ground for an acquittal of the defendant, unless it appear that such variance was material to the merits of the case or prejudicial to the defendant. Mulrooney v. State, 26 O. S. 326.

Elijah Davidson and Elijah B. Davidson are different names, and the description of a person in an indictment by one of these names is not, in the absence of statutory provision, supported by proof of a person bearing the other name. But such variance comes within this section, and can not work an acquittal of the defendant, unless it is found to be material to the merits of the case, or that it may be prejudicial to the defendant. In order to prevent it working such acquittal, however, it must appear that the *person* intended to be described in the indictment and the person described in the proof are identical, the variance arising from a mere mistake as to *name*. Whether the mistake has so misled or prejudiced the defendant, is a question for the court; but it is for the jury to say whether the *person* intended to be described in the indictment is the same as that described in the proof; and it is error in the court to take the latter question from the jury, by instructing them that the variance arose from a mere mistake in name, or that the grand jury intended by one name to describe a person shown by the evidence to be of a different name. Mead v. State, 26 O. S. 505.

Where a party to a judicial proceeding is described in the indictment as Curtis Pratt, which was his true name, it is not error to admit in evidence a transcript in which the same person is described as Curt Pratt, the variance under this section not being material. Lytle v. State, 31 O. S. 196.

In an indictment for forgery of a promissory note, the omission in setting it out according to its "purport and value" (§ 7218, Revised Statutes), of a power of attorney to confess judgment, attached to the note, is not a variance material to the merits of the case, nor prejudicial to the defendant, and, therefore, not a ground of acquittal. Section 7216, Revised Statutes. Burdge v. State, 53 O. S. 512.

The allegation of an indictment that the accused feloniously broke and entered the poultry house of P is supported by evidence that he thus entered one of several compartments under a continuous roof, that entered being completely separated from the others and being in the exclusive possession of P as a tenant, and used by him as a poultry house. State v. Buechler, 57 O. S. 95.

Where the indictment charged the burglary of a barn, and the proof showed the burglary of a store-house in the barn. Walters v. State, 39 O. S. 216.

The indictment should pursue the language of the statute; there is no such thing as a common law crime in Ohio. Van Valkenburg v. State, 11 O. 404.

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Where, in charging an offense of a higher grade, an indictment necessarily charges one of a lower, defendant can be convicted of any crime indictment covers. Stewart v. State, 5 O. 241.

An indictment for burning stacks of wheat is not supported by evidence of burning shocks of wheat. Denbow v. State, 18 O. 11.

An indictment charging that the prisoner broke into a *store-room* is insufficient under a statute making it an offense to break into a "store-house," and the defect is available to him, although the objection was not made until the verdict had been rendered. Hagar v. State, 35 O. S. 268.

Prior to the Criminal Code of 1869, proof that the accused stole a gray gelding would not support a charge of stealing a gray horse. Hooker v. State, 4 O. 348.

Where the separate property of a wife had been stolen from the family residence, such fact alone will not authorize a conviction under an indictment laying the property in the husband. Pratt v. State, 35 O. S. 514.

Averment as to John K. Pickens. Proof of John Pickens held to be a variance. Pickens v. State, 6 O. 275.

"Promissory notes of the United States given for payment of money," giving their denomination, sufficient to sustain indictment for larceny. Hummel v. State, 17 O. S. 628.

One bushel of a certain cultivated plant and vegetable product, commonly called "corn," sufficient to charge that ears of corn were plucked off the growing plant. Wiswell v. State, 21 O. S. 658.

On trial in an indictment for foeticide, containing two counts—one death by an instrument, the other by drugs—a general verdict of "guilty" is not bad for repugnancy. Tabler v. State, 34 O. S. 127.

An indictment against a person by the initials of his Christian name is good after verdict, but bad on plea of abatement. Smith v. State, 8 O. 295.

See Price v. State, 19 O. 423; State v. Gardiner, Wright, 392; Lasure v. State, 19 O. S. 43; State v. Miller, 13 C. C. 67; 7 O. C. D. 552.

Persons to the grand jury unknown. Nickel v. State, 6 C. C. 601; 3 O. C. D. 605.

Other decisions as to variance. Schmeltz v. State, 8 C. C. 82; 4 O. C. D. 287; May v. State, 14 O. 461; Stephens v. State, 14 O. 386; Hess v. State, 5 O. 5.

On the trial of an indictment charging the defendant with the crime of burglary, a variance between an allegation of said indictment and the evidence offered in support of it, in the name or description of the building alleged to have been broken and entered, is not ground for an acquittal of the defendant, unless such variance is material to the merits of the case or prejudicial to the defendant. Section 7216, Revised Statutes (G. C., § 13582). State v. Turnbaugh, 79 O. S. 63.

Where the allegation in an indictment is, that the accused maliciously and forcibly broke and entered the store-house of B, and the evidence offered in support of such allgation establishes the fact that he thus broke and entered a certain room, the property of B, built for and by him occupied and used exclusively as a store-house, which room adjoined another compartment or room in the same building, occupied by B and family as a living room, the two compartments, however, being separated by a permanent partition, and the only means of communication between them being through a door in said partition which was kept locked at night, and which on the night of the burglary was shown to have been securely locked and fastened, the variance, if any, between the averment of said indictment and the proof is not sufficient ground for an acquittal of the defendant. State v. Turnbaugh, 79 O. S. 63.

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An allegation in an indictment descriptive of that which is essential to the charge therein made is a material allegation and can not be rejected as surplusage. Where an indictment charges the accused with having assaulted and killed one "Percy Stuckey, *alias* Frank McCormick," evidence that the defendant assaulted and killed a person commonly known as Frank McCormick will not sustain a verdict of guilty against the defendant unless it also be shown that the Frank McCormick assaulted and killed and Percy Stuckey were one and the same person. Goodlove v. State, 82 O. S. 365.

On the trial of an indictment under § 6816, Revised Statutes (G. C. § 12414), for carnally knowing and abusing a female person under the age of sixteen years with her consent, the evidence having established the carnal knowledge and the alleged ages of the parties, evidence tending to show that the act was committed without consent does not constitute a fatal variance. State v. Carl, 71 O. S. 259.

A mistrial should not be ordered in a cause simply because some error has intervened. The error must prejudically affect the merits of the case and the substantial rights of one or both of the parties, and this is as true of the temporary absence of the judge as any other departure from due process of law during the trial of a cause. Tingue v. State, 90 O. S. 368.

Mere matter of unnecessary particularity or immaterial description contained in an indictment is not sufficient upon which to base a charge of variance between pleading and proof. Such variance must be based upon some essential element of the offense or some essential part of such element. Tingue v. State, 90 O. S. 368.

The word "obtain," as used in section 13104, General Code, is not limited to getting, securing or appropriating money or property as owner. It includes as well the getting or securing of money or property by way of a loan. Tingue v. State, 90 O. S. 368.

Courts take judicial notice that Christian and surnames are abbreviated. Hence, in a prosecution before a mayor under General Code, § 13195, for keeping a place where intoxicating liquors are sold in violation of law, the fact that accused is named in affidavit by initials instead of his full name does not necessitate a reversal for variance under General Code, § 13582, especially where no objection is made on the trial thereto and in his internal revenue certificate and state liquor tax application it appears that his name is designated by such initials. Sanders v. State, 20 C. C. (N.S.) 395, 24 O. C. D. 226, 1 O. A. R. 306.

Where an indictment alleges that the accused induced a female person under eighteen years of age to enter a house of ill-fame for the purpose of prostitution, and described the house as No. 501 Hamilton avenue, in the city of Cleveland, and the only proof is that he induced her to enter No. 415 Hamilton avenue in the city of Cleveland, the variance between the allegation and the proof is fatal. Goldbern v. State, 17 C. C. (N.S.) 101.

The fact that the witnesses offered by the state in a criminal prosecution differ as to the date of the commission of the offense charged in the indictment, does not constitute a variance between the allegations of the indictment and the proofs, but if it appears from the whole evidence that the witnesses for the state are testifying to different transactions, the state, at the close of its evidence, may be required to elect as to which transaction it will rely upon for conviction. Angeloff v. State, 91 O. S. 361.

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The uttering and publishing of a forged instrument is complete where it is presented for payment, and the omission of defendant's indorsement from the back of the copy of the instrument as set out in the indictment is an immaterial variation as the offense charged was complete when the indorsement was made. Lieblang v. State, 21 C. C. (N.S.) 539.

Reviewing courts will allow a rather wide discretion to trial courts in the matter of compelling election between different counts in one indictment. As a general rule distinct offenses may be joined in different counts of the same indictment, either where they arise out of and are connected with the same transaction, or where they are connected by the same subject-matter. Harveysburg Fertilizer Co. v. State, 7 O. A. R. 84.

An indictment that alleges ownership of an automobile in the name of the garage owner, or other lawful custodian, is sufficient under the requirements for an indictment under the larceny statute, as well as under favor of section 12619, General Code. State v. Shoemaker, 96 O. S. 570.

Where the evidence discloses such qualified ownership in the garage owner or other bailee and further discloses the name of the legal owner of the automobile, this does not constitute a variance in law to the prejudice of the defendant. State v. Shoemaker, 96 O. S. 570.

In an indictment for manslaughter such unlawful act need not be pleaded in the indictment. The short form of indictment provided in section 13583, General Code, is not in conflict with the constitutional guaranty that the accused shall be advised of "the nature and cause of the accusation against him." Such unlawful act relied on by the state as the basis for the charge of manslaughter may be made unlawful by more than one statute. In such case it is error to compel the state to elect upon which statute it relies for a conviction. (Bailey v. State, 4 O. S. 440, approved and followed.) State v. Schaeffer, 96 O. S. 215.

Where an indictment for manslaughter charges the defendant with having "unlawfully killed Adelbert Chaky, sometimes otherwise known as Buley Csaki," and there is no evidence tending to prove the alias, or that both names were the names of the same person, such failure is not a fatal variance, because it is not prejudicial to the merits of the case and the substantial rights of the defendant. (Goodlove v. State, 82 O. S. 365, disapproved.) State v. Schaeffer, 96 O. S. 215.

Entry—Prisoner discharged for variance, etc.

(Title.) Indictment for ———.

This cause coming on for hearing on the motion to quash the indictment herein, and the court finding that there is a variance between the statement in said indictment and the evidence offered, which is material and prejudicial to the substantial rights of the defendant, said motion is granted; and the said defendant is discharged.

Sec. 13583. What are sufficient allegations in indictment for murder in the second degree and manslaughter.

In an indictment for murder in the second degree or manslaughter, the manner in which, or the means by which the death was caused need

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not be set forth. It shall be sufficient in an indictment for murder in the second degree to charge that the defendant did purposely and maliciously, and for manslaughter that the defendant did unlawfully, kill the deceased. (R. S. § 7217; 66 v. 301, § 92.)

Constitutionality of section.—This section is not repugnant to the constitution of the state. Wolf v. State, 19 O. S. 248; Williams v. State, 35 O. S. 175.

Manslaughter, indictment for.—An indictment in which it is charged that the defendant unlawfully killed the deceased, is sufficient, notwithstanding the change in the language of the section of the crimes act defining manslaughter (74 v. 244, § 4), and in the section relating to the sufficiency of indictments for that offense (74 v. 335, § 6). Wolf v. State, 19 O. S. 248, approved. Williams v. State, 35 O. S. 175.

Where, on the trial of a defendant on an indictment charging him with murder in the first degree, the jury returned a verdict, finding him not guilty of murder in the first or second degree, but guilty of manslaughter only, and a judgment was entered upon such verdict, which was afterwards, on proceedings in error, instituted by the defendant, reversed for error occurring on the trial, and the case was remanded to the trial court for further proceedings therein, it was nor error for such court to try the defendant on the charge made in the indictment, and if the evidence warranted it, the defendant might properly be convicted of murder in the first or second degree, of which by the former finding of the jury he had been acquitted. Hurley v. State, 4 C. C. 425, 2 O. C. D. 630, affirmed, 23 W. L. B. 465.

An indictment for manslaughter, drawn after the approved common law precedents, is good in a prosecution under the statute of Ohio for the same offense. Sutcliffe v. State, 18 O. 469.

An indictment for manslaughter, which avers that the defendant did unlawfully kill and slay another, while the slayer was in the commission of an unlawful act—i. e., the act of using instruments and drugs upon the person of a woman, with intent to procure an abortion—without averring that death was occasioned by the use of such instruments or drugs, is a sufficient indictment for manslaughter. State v. Barker, 28 O. S. 583.

In an indictment for manslaughter such unlawful act need not be pleaded in the indictment. The short form of indictment provided in section 13583, General Code, is not in conflict with the constitutional guaranty that the accused shall be advised of "the nature and cause of the accusation against him." Such unlawful act relied on by the state as the basis for the charge of manslaughter may be made unlawful by more than one statute. In such case it is error to compel the state to elect upon which statute it relies for a conviction. (Bailey v. State, 4 O. S. 440, approved and followed.) State v. Schaeffer, 96 O. S. 215.

Where an indictment for manslaughter charges the defendant with having "unlawfully killed Adelbert Chaky, sometimes otherwise known as Buley Csaki," and there is no evidence tending to prove the alias, or that both names were the names of the same person, such failure is not a fatal variance, because it is not prejudicial to the merits of the case and the substantial rights of the defendant. (Goodlove v. State, 82 O. S. 365, disapproved.) State v. Schaeffer, 96 O. S. 215.

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Where all the evidence clearly and conclusively shows that the unlawful act relied upon by the state directly caused the killing, and there is no evidence to the contrary, the failure of the court to charge on assault or assault and battery is not error. (Marts v. State, 26 O. S. 162, and Dresback v. State, 38 O. S. 365, approved and followed. So far as the case of Lindsey v. The State, 69 O. S. 215, is in conflict with the two foregoing cases, said Lindsey case is disapproved.) State v. Schaeffer, 96 O. S. 215.

The unlawful act relied upon as the predicate for manslaughter must be the proximate cause of death. If death resulted from any other cause, or there be a reasonable doubt as to the unlawful act being the proximate cause of death, the jury should acquit. But where, upon the undisputed facts, it clearly and conclusively appears to a moral certainty that the unlawful act complained of was the proximate cause of death, a failure to so charge, especially where there was no request to so charge, is not reversible error. State v. Schaeffer, 96 O. S. 215.

In a prosecution for manslaughter under section 12603, General Code, the court should charge the jury that the standard of conduct required of the defendant in the operation of his car is that of an ordinarily careful and prudent person, and that if he did not operate the car "at a speed greater than is reasonable or proper, having regard for width, traffic, use and the general and usual rules of such road or highway, or so as to endanger the property, life or limb of any person," as would appear to such ordinarily careful and prudent person in the then situation, he was not guilty of manslaughter. State v. Schaeffer, 96 O. S. 215.

The words "motor vehicle" are sufficiently broad and comprehensive to include automobiles. The words "public road or highway" are synonymous with, or at least include, a public street. Schier v. State, 96 O. S. 245.

The charge of manslaughter was based upon the commission of an act made unlawful by three several statutes, as to any one of which the jury, upon the whole record, were abundantly warranted in finding the defendant guilty; but under a long line of decisions of this court proof of guilt beyond a reasonable doubt as to the unlawful act under any one statute, which unlawful act was the proximate cause of the death of the person named in the indictment, would be legally sufficient to sustain the conviction. Schier v. State, 96 O. S. 245.

For manslaughter, see G. C. § 12404 and note.

Murder in the second degree.—See G. C. § 12403 and note.

The form of indictment declared to be sufficient by this section is not indispensable. Hence, an indictment for murder in the second degree, in which the word "malice" is not found, is good if it sets forth the manner and means of killing in such language as to necessarily import malice. Lindsey v. State, 69 O. S. 215.

An indictment charging that the defendant "did unlawfully, purposely and maliciously kill and murder" the deceased, is sufficient under this section, the word purposely importing an intent to kill. State v. Williamson, 7 Dec. Rep. 618, 4 Bull. 279.

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Sec. 13584. Sufficiency of indictment.

In an indictment for falsely making, altering, forging, printing, photographing, uttering, disposing of or putting off an instrument, it shall be sufficient to set forth the purport and value thereof, and where the instrument is a promise to pay money conditionally, it shall not be necessary to allege that the condition has been performed. (101 v. 206; R. S. § 7218; 66 v. 301, § 93.)

Purport and value—Meaning of averment.—The legal import of the averment "of the purport and value following" is that the instrument is of the substance and effect following, not that what follows is a copy, in words and figures, of the forged writing. Dana v. State, 2 O. S. 91.

In an indictment for forgery of a promissory note, the omission, in setting it out according to its "purport and value" (§ 7218, Revised Statutes), of a power of attorney to confess judgment, attached to the note, is not a variance material to the merits of the case, nor prejudicial to the defendant, and, therefore, not a ground of acquittal. (Section 7216, Revised Statutes.) Burdge v. State, 53 O. S. 512.

Value—Meaning of, in section.—The word value is used in this section in the sense of "effect," "import," and not in the sense of "worth in money." Chidester v. State, 25 O. S. 433.

Where an order is drawn by a village clerk on the treasurer of said village, signed by him in his own name as clerk of the village, directing the payment of money to a person named therein, which was afterwards uttered and published by him as genuine, an indictment against him, containing two counts—one charging him with falsely making such order with intent to defraud, and the other charging him with unlawfully uttering and publishing said false order with intent to defraud, he at the time well knowing said order to be false, does not state facts sufficient to constitute an offense. Snyder v. State, 8 C. C. 463; 4 O. C. D. 279.

The provisions of this section do not apply to § 7061 (G. C., § 13350). State v. Granville, 45 O. S. 274.

Sec. 13585. What is sufficient description in certain indictments.

In an indictment for engraving or making the whole or part of an instrument, matter or thing, or for using or having the unlawful custody or possession of a plate or other material upon which the whole or part of an instrument, matter or thing was engraved or made, or for having the unlawful custody or posession of a paper upon which the whole or part of an instrument, matter or thing was made or printed, it shall be sufficient to describe such instrument, matter or thing by any name or designation by which it is usually known. (R. S. § 7219; 66 v. 302, § 94.)

Cited in State v. Granville, 45 O. S. 274.

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Sec. 13586. Description of instruments in other cases.

In all other cases, when it is necessary to make an averment in an indictment as to an instrument, whether it consists wholly or in part of writing, print or figures, it shall be sufficient to describe such instrument by any name or designation by which it is usually known, or by the purport thereof. (R. S. § 7220; 66 v. 302, § 95.)

An indictment under § 7079 need not set forth copy of deed, nor aver that the deed, where it purports to convey land in another state, was in the form of a proper conveyance under the laws of such state. Sufficient to aver that conveyance was by deed of general warranty. Kerr v. State, 36 O. S. 614.

Cited in State v. Granville, 45 O. S. 274.

An indictment for a violation of § 7027, Revised Statutes (G. C., § 13035), which charges that the accused, at a certain time and in certain county, "unlawfully did have in his possession two hundred and twenty-one copies of a certain article of an indecent and immoral nature, to-wit, a certain printed pamphlet of an indecent and immoral nature, entitled "Circular Number One—A Biographical Sketch of a Few Short Skate Politicians," for the purpose of giving away, exhibiting and publishing the said pamphlet, which said pamphlet is so indecent and immoral in its nature that the same would be offensive to the court and improper to be placed upon the records thereof," is sufficient in law, without containing a copy of the alleged indecent and immoral pamphlet. State v. Zurhorst, 75 O. S. 232.

Sec. 13587. What averments sufficient in indictment for perjury.

In an indictment for perjury or for subornation of perjury, it shall be sufficient to set forth the substance of the offense charged, and before what court or authority the oath was taken, averring such court or authority to have full power to administer such oath, with the proper averments to falsify the matters wherein the perjury is assigned, without setting forth any part of a record or proceeding, or the commission or authority of the court or other authority, before which such perjury was committed. (R. S. § 7221; 33 v. 33, § 11; S. & C. 405.)

In an indictment for perjury, it is sufficient to aver that the court had power to administer the oath, without setting forth the facts necessary to give jurisdiction. It may be admitted that this general form of allegation would be bad, by the rules of common law, without it necessarily following that the court of common pleas erred in refusing to arrest judgment in this case, for, by recurring to § 11 of the act for the punishment of crimes (Swan's Stat. 231), it will be seen that, in this state, the common law has been modified by express legislation. Halleck v. State, 11 O. 400.

In an indictment for perjury it is not necessary to allege: *a.* Whether the alleged false testimony was given orally or in writing. *b.* Such facts as will show that the same was material. Barnes v. State, 15 C. C. 14; 8 O. C. D. 153 (affirmed, 58 O. S. 700).

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On the trial of such indictment, the state need not offer the journal entry to show the trial and disposition of the case in which the alleged false testimony was given, it having shown, by the records of the court, the pendency of such case, and by oral evidence, given without objection, the trial thereof. Barnes v. State, 15 C. C. 14; 8 O. C. D. 153

On the trial of one charged with perjury, it is not error to exclude evidence offered by him to show that the court did not consider the alleged false testimony in giving its judgment in such case. Barnes v. State, 15 C. C. 14; 8 O. C. D. 153.

Whether certain testimony is material to an issue on trial, is a question of law and not of fact. Barnes v. State, 15 C. C. 14; 8 O. C. D. 153.

An essential element in the crime of subornation of perjury is the knowledge or belief on the part of the accused not only that the witness will swear to what is untrue, but also that he will do so corruptly and knowingly. Stewart v. State, 22 O. S. 477. What sufficiently charges the defendant with knowledge that the witness would corruptly and knowingly swear falsely. *Ib.*

See note to State v. Jackson, 36 O. S. 281, under § 12842.

In an indictment for perjury, it is sufficient to charge, generally, that the false testimony was in respect to a matter material in the action in which it was given. Dilcher v. State, 39 O. S. 130.

Where the testimony of a witness goes directly to the matter in issue, an indictment for perjury will be good which sufficiently negatives the truth of the particular circumstances testified to. *Ib.*

Perjury can not be based on a false oath before an officer *de facto*. Staight v. State, 39 O. S. 497.

An indictment will not lie for the giving of false testimony before a grand jury, where from a reading of the indictment it is impossible to determine why or upon what ground the matter to which the defendant testified was material to the investigation which was being carried on by the grand jury. State v. Tanner, 9 O. L. R. 18.

Demurrer lies to an indictment for perjury on the part of a witness who falsely stated before the grand jury that he did not know the identity of the person who handed him a bottle of beer, when there is no allegation in the indictment that the alleged offense occurred in a district in which it was contrary to law to sell or give away beer or other intoxicating liquor. State v. Hill, 9 O. L. R. 272.

In an indictment for perjury against the secretary of an insurance company for making a false annual statement to the superintendent of insurance, it is not necessary to make averments as to the nature of the business, nor that it is authorized by the laws of this state. State v. Mulford, 12 O. D. 657.

For the crime of perjury, see § 12842.

For the crime of corrupting a witness, see § 12825.

For the crime of intimidating a witness, see § 12866.

Sec. 13588. What are sufficient allegations in an indictment for unlawfully selling liquor.

An indictment need not allege the kind of liquor sold, nor describe the place where sold in violation of the following laws, namely:

1. Keeping a place where intoxicating liquor is sold in violation of law;

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2. Buying intoxicating liquor for or furnishing it to a minor or person intoxicated or in the habit of getting intoxicated;

3. Selling, giving away or disposing of intoxicating liquor or exposing it for sale nearer to certain public gatherings than is permitted by law;

4. Selling intoxicating liquor or keeping a house of ill-fame nearer to a public institution than is permitted by law;

5. Conveying spirituous or malt liquor or wine into a jail, or permitting a prisoner therein to receive it;

6. Selling or giving away spirituous, vinous or malt liquor on election day, or failing to keep closed upon election day a house where such liquor is habitually sold and drank. (R. S. § 7222; 52 v. 153, § 13; S. & C. 1435.)

A general verdict that the defendant "is guilty in manner and form as he stands charged in the indictment," where the indictment contains two counts charging distinct misdemeanors, will authorize a sentence upon each count. Eldredge v. State, 37 O. S. 191.

In an indictment under § 6942; it is a sufficient description of the unlawful sales to aver that they were made "in violation of § 6941 of the Revised Statutes of Ohio," and the reference to the section must be understood as referring to the section then in force. Oshe v. State, 37 O. S. 494.

In the prosecution of a druggist for violating the municipal local option law (95 v. 87), it is not sufficient to charge that he sold intoxicating liquor upon a written prescription and that the sale was not made by him in good faith for medicinal purposes, without alleging that it was known to him that the liquor would be used for other than the purpose the prescription called for, or some other fact tending to show that it was not sold in good faith. Rowland v. State, 18 C. C. (N.S.) 598 (affirmed, 80 O. S. 711).

Sec. 13589. Not necessary to name the person to whom liquor was sold.

In an indictment for keeping a place where intoxicating liquor is sold in violation of law, the name of the person to whom it was sold need not be alleged. (R. S. § 7222; 52 v. 153, § 13; S. & C. 1435.)

The names of persons to whom liquors were sold need not be set forth in an affidavit charging the offense of keeping a place for the sale of intoxicating liquors, in violation of the Beal Local Option Law. Dalrymple v. State, 5 C. C. (N.S.) 185; 16 O. C. D. 562.

In prosecutions founded on affidavit, information or indictment, for selling intoxicating liquors to be used as a beverage, in violation of the Beal local option law, it is necessary to allege the name of the purchaser of such intoxicating liquors, or that his name is to the affiant, informant or grand jury unknown, State v. Ridgway, 73 O. S. 31.

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Sec. 13590. How an intent to defraud may be alleged.

It shall be sufficient, in an indictment where it is necessary to allege an intent to defraud, to allege that the accused did the act with intent to defraud without alleging an intent to defraud a particular person or body corporate. On the trial of such indictment an intent to defraud a particular person need not be proved and it shall be sufficient to prove that the accused did the act charged, with intent to defraud. (R. S. § 7223; 66 v. 302, § 96.)

Cited, Corbett v. State, 5 C. C. 155, 157.

An indictment must set forth every circumstance of knowledge, intention or action that constitutes the criminal design. There can be no intention without knowledge, and an indictment for aiding to pass a forged paper must set forth that the accused knew it to be a forgery. Anderson v. State, 7 O. (pt. 2) 250.

It is sufficient to allege an intent to defraud a member of a firm and evidence that the intent was to defraud the firm is sufficient to support such allegation. Stoughton v. State, 2 O. S. 562.

This section is not in conflict with § 10 of the Bill of Rights, which requires the accused, on demand, to be furnished with the nature and cause of the accusation against him. Turpin v. State, 19 O. S. 540; Bainbridge v. State, 30 O. S. 264.

The indictment must charge the intent to defraud directly, and not merely by way of legal deduction or inference from the facts previously found. Drake v. State, 19 O. S. 211.

It is not necessary, in an indictment under the act of April 12, 1858, entitled "an act to prevent the selling and bartering of counterfeit coin," etc., to aver that the sale was made with an intent to defraud. Leonard v. State, 29 O. S. 408.

An indictment for obtaining money or property by false pretense must aver all of the material facts necessary to be proven in order to convict, and that the false pretenses were false in fact and induced the owner to part with his property. Horton v. State, 85 O. S. 13.

Where intent is an essential element of the crime, if it is not alleged a demurrer will lie, if it is insufficiently alleged a motion to quash will lie. Searles v. State, 6 C. C. 331, 3 O. C. D. 478.

The court finds no evidence in the record that the defendant was prejudiced by proceeding with the trial immediately after refusal to grant a change of venue, or that error intervened in admitting evidence of a conspiracy, or in the charge of the court to the jury or in the finding of the jury that the defendant was guilty of presenting a false claim against the county in connection with a bridge contract. Townsend v. State, 17 C. C. (N.S.) 380, 25 O. C. D. 408 (affirmed, 88 O. S. 584).

Sec. 13591. How joint ownership of property alleged, etc.

In an indictment for an offense committed upon, or in relation to property belonging to partners or joint owners, it shall be sufficient to allege the ownership of such property to be in such partnership by its firm name, or in one or more of such partners or owners, without naming all of them. (R. S. § 7224; 47 v. 21, § 3; 66 v. 302, § 97; S. & C. 1632; S. & S. 269.)

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Where, in a case of larceny of property charged in the indictment to belong to one R, it appeared in the evidence that only a part of the several articles of property stolen belonged to R, and that the other part belonged to said R and one C as partners, it was not error for the court to charge the jury that they might, under the indictment, find the accused guilty, as well of the larceny of the articles belonging to R and C as of the articles belonging to R alone, and might include both in ascertaining the value of the property. Lazure v. State, 19 O. S. 43.

This section was intended to take the case herein provided for out of the operation in the rule prescribed in G. C. § 13582, relating to variance. Mulrooney v. State, 26 O. S. 327.

The rule prescribed by this section is a rule of pleading and not of substantive law. Jones v. State, 70 O. S. 36.

See note to State v. Buechler, 57 O. S. 95, under § 13582.

Sec. 13592. Not necessary to state ownership or value of a will or codicil.

In an indictment for stealing a will, codicil or other testamentary instrument, or, for a fraudulent purpose, keeping, destroying or secreting it, whether in relation to real or personal estate, or both, or during the life of a testator or after his death, it shall not be necessary to allege the ownership or value thereof. (R. S. § 7224; 47 v. 21, § 3; 66 v. 302, § 97; S. & C. 1632; S. & S. 269.)

Sec. 13593. How election may be averred.

In an indictment for an offense committed in relation to an election, it shall be sufficient to allege that such election was authorized by law, without stating the names of the officers holding it or the person voted for or the offices to be filled thereat. (R. S. § 7225; 66 v. 302, § 98.)

An indictment for illegal voting must designate the election at which defendant voted, notwithstanding this section. Lane v. State, 39 O. S. 312.

See State v. Granvelle, 15 W. L. B. 419; Ebbenpowel v. State, 14 C. C. 129; 7 O. C. D. 572.

Sec. 13594. Count for embezzlement, etc., in indictment for larceny.

An indictment for larceny may contain counts for obtaining the same property by false pretense, for embezzlement thereof, and for receiving or concealing it, knowing it to have been stolen, or any of such counts, and the jury may convict of any of such offenses and find all or any of the persons indicted guilty of any of such offenses. (R. S. § 7227; 66 v. 302, § 99.)

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Where an indictment for larceny, a count is added under the provisions of § 7227, Revised Statutes, for receiving stolen property, knowing it to have been stolen, without an averment that it is the same property, the state cannot be required to elect on which count it will proceed, where it appears from the description to be the same property, and no motion has been made to quash upon that specific ground. Whiting v. State, 48 O. S. 221.

Where two closely allied offenses arise from the same transaction, and may be established by substantially the same evidence, both may be included in separate counts of the same indictment. State v. Baily, 50 O. S. 636.

Cited in McGuire v. State, 3 C. C. 557.

For receiving stolen property, see § 12450.

For larceny, see § 12447.

For obtaining property by false pretenses, see § 13104.

For embezzlement, see § 12873, and following sections.

Sec. 13595. How bank bills, etc., to be described.

In an indictment in which it is necessary to make an allegation as to money, bank bills, notes, United States treasury notes, postal and fractional currency, or other bills, bonds or notes, issued by lawful authority and intended to pass and circulate as money, it shall be sufficient to describe such money, bills, notes, currency or bonds as money, without specifying a particular coin, note, bill or bond; such allegation shall be sustained by proof of any amount of coin, or any such note, bill, currency or bond, although the particular species of coin of which such amount was composed or the particular nature of such note, bill, currency or bond be not proved. (R. S. § 7228; 66 v. 302, § 100.)

Indictment for stealing bank bills must aver a scienter or it is defective. Gatewood v. State, 4 O. 386.

In an indictment which charges that the accused "unlawfully and feloniously did steal money of the amount and value of fifty-five dollars, the property of," etc., the property stolen is sufficiently described under this section, although the indictment does not show what kind of money is charged to have been stolen, or that it was issued by lawful authority, or that it was intended to pass or circulate as money. McDivit v. State, 20 O. S. 231.

Sec. 13596. When complete record need not be made.

In criminal prosecutions when the indictment has been quashed or the prosecuting attorney has entered a *nolle prosequi* thereon, a complete record need not be made by the clerk, of the cause. (R. S. § 5337; 51 v. 57, § 392; S. & C. 1057.)

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PROCESS.

Sec. 13597. Warrant on indictment and arrest of accused.

A warrant may be issued, in term time or in vacation of the court, on an indictment found, and when directed to the sheriff of the county where such indictment was found or presentment made, he may pursue and arrest the accused in any county and commit him to the jail or hold him to bail, as provided in this title. (R. S. § 7229; 68 v. 4, § 101; S. & C. 1176.)

Where an indictment is duly found and presented to the court of common pleas, against a county commissioner, charging him with misconduct in office, as set out in the indictment, and a warrant is issued thereon from the court, on which the defandant is arrested and committed to the custody of the sheriff, and application is made to the circuit court for a writ of *habeas corpus* and the discharge of the defendant from the custody of said officer, while the case remains undisposed of in the court of common pleas. *Held*, that said court of common pleas being a court of general criminal jurisdiction, and with power and authority to hear and determine all indictments for misconduct in office, in the proper county, had jurisdiction to issue such process and render any proper judgment thereon. And that under the provisions of § 5729, Revised Statutes, another court having jurisdiction, in *habeas corpus*, ought not to allow the writ and discharge the defendant. And this is the case, even if there be informality or defect in the proper judgment or order, if it appear that the court issuing the process had jurisdiction to do so. Hatch v. St. Clair, Sheriff, 2 C. C.. 163; 1 O. C. D. 421..

Warrant upon indictment.

The State of Ohio, ——— county, ss.

To the sheriff of said county, greeting:

Whereas, at the ——— term, A. D. 19—, of the court of common pleas of said county of ———, an indictment was found by the grand jury thereof against E F, for a certain misdemeanor (or, felony, as the case may be), to-wit, for (state the offense).

You are, therefore, commanded to arrest and safely keep the said E F, so that you have his body before our said court on the first day of the next term thereof (or, forthwith), to answer the charge of this indictment, and that you have with you then and there this writ.

Given under my hand and seal of said court, this ——— day of ———, A. D. 19—.

E L,

(L. S.) Clerk of Court of C. P. ——— county, O.

Sec. 13598. Warrant when accused lives out of the county in which he is indicted.

When the accused resides out of the county in which the indictment was found, a warrant may issue thereon directed to the sheriff of the county where such accused resides or is found. Such sheriff shall

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arrest such accused and convey him to the county from which such warrant issued and there commit him to the jail or hold him to bail, as provided in this title. (R. S. § 7230; 66 v. 303, § 102; S. & C. 1176.)

Warrant directed to the sheriff of another county.

The State of Ohio, ——— county, ss.

To the sheriff of ——— county, in said state ,greeting:

Whereas, at the ——— term, A. D. 19—, of the court of common pleas of said county of ———, an indictment was found by the grand jury thereof against E F, for a certain misdemeanor (or, felony, as the case may be), to-wit, for (state the offense). And, whereas, it is represented that the said E F resides or is found in the said county of ———.

You are, therefore, commanded to arrest and safely keep the said E F, so that you have his body before our said court on the first day of the next term thereof (or, forthwith), to answer the charge of said indictment, and that you have with you then and there this writ.

Given under my hand and seal of said court, this ——— day of ———, A. D. 19—.

E L,

(L. S.) Clerk of Court of C. P. ——— county, O.

Sec. 13599. Warrant when accused escapes during trial.

When the accused escapes and forfeits his recognizance after the jury is sworn, at the request of the prosecuting attorney, a warrant reciting the facts may issue to the sheriff of any county, who shall pursue, arrest and commit him to the jail of the county, from which such warrant issued, until he is discharged by law. (R. S. § 7232.)

Where, pending trial, the accused, being on bail, absconds, it is legal to proceed with the case, and to receive a verdict in his absence. Fight v. State, 7 O. (1 pt.) 181.

Sec. 13600. When convict in penitentiary is indicted for offense committed therein.

When a convict in the penitentiary is indicted for an offense committed while confined therein, he shall remain in the custody of the warden of the penitentiary, subject to the order of the court of common pleas of Franklin county. (R. S. § 7233; 66 v. 321, § 222; S. & S. 521.)

Sec. 13601. Certain convicts in the penitentiary removed for sentence or trial.

A convict in the penitentiary who escaped or forfeited his recognizance before receiving sentence for a felony or against whom an indictment for felony is pending, may be removed to the county in

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ich such conviction was had or such indictment was pending, for ıtence or trial, upon the warrant of the court of such county. This tion shall not extend to the removal of a convict for life, except the ıtence to be imposed or the indictment pending against him, is for ırder in the first degree. (R. S. § 7234; 66 v. 118, § 1; 63 v. 20, 2, 5; S. & S. 521.)

This and § 13605 show that one sentence must be served out for each offense, l if a convict escapes and is sentenced for another crime, he may after serving out latter sentence be held to serve out the remainder of the first sentence. Hender- v. James, 52 O. S. 242, 256.

There is no statutory authority in Ohio for serving a warrant on an officer the corporation against which a complaint is lodged before a magistrate by esting such officer. Reinhart & Newton Co. v. State, 15 N. P. (N.S.) 92, 23 O. 500.

If the president of a corporation is arrested on a complaint against the corpora- ı for violation of a penal statute, and if the corporation thereafter files a tion to quash on grounds other than that of a lack of jurisdiction of the person, s is a voluntary appearance of the corporation and the justice has jurisdiction. motion to quash because the justice has no jurisdiction of the person of the endant and of the subject-matter is an appearance, though the defendant states ıppears solely for the purpose of the motion. Reinhart & Newton Co. v. State, N. P. (N.S.) 92, 23 O. D. 500.

c. 13602. The warrant for removal and how executed.

The warrant for such removal shall be in the usual form, except ıt it shall set forth that the accused is in the penitentiary; it shall directed to the sheriff of the county in which the conviction was had the indictment is pending. When a copy thereof, with the approval the governor indorsed thereon, is presented to the warden of the nitentiary, he shall deliver the convict to the sheriff, who shall convey n to such county and commit him to the jail thereof. For removing returning such convict the sheriff shall receive fees as are allowed law for conveying convicts to the penitentiary. (R. S. § 7235; 63 20, §§ 2, 6; S. & S. 521, 522.)

c. 13603. Governor must approve the warrant before removal.

The sheriff shall present the warrant to the governor, who, if satis- d that such convict ought to be removed for sentence or trial, shall lorse his approval thereon. Without such approval and indorse- nt the warden shall not surrender the convict. (R. S. § 7236; 63 v. § 2; S. & S. 521.)

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Sec. 13604. Where such convict to be confined.

A convict so removed shall be kept in jail subject to be taken into court for sentence or trial. If the case be continued or the execution of the sentence be suspended, the court may order him to be returned to the penitentiary by the sheriff, who shall deliver with him a certified copy of such order to the warden, who shall again deliver him to the sheriff upon another order of the court, duly certified. (R. S. § 7237; 63 v. 20, §§ 3, 4; S. & S. 522.)

Sec. 13605. To be returned to the penitentiary or executed.

If such convict is acquitted, he shall be forthwith returned by the sheriff to the penitentiary to serve out the remainder of his term, but, if he is sentenced to imprisonment in the penitentiary, he shall forthwith be returned thereto by the sheriff and the term of such imprisonment shall begin at the expiration of the term for which he was imprisoned at the time of his removal. If he is sentenced to death, such sentence shall be executed as if he were not under sentence or imprisonment in the penitentiary. (R. S. § 7238; 63 v. 20, § 3; S. & S. 522.)

See note under § 13601, Henderson v. James, 52 O. S. 242, 256.

Sec. 13606. Escaped convict to be arrested and returned.

Sheriffs, coroners and constables shall arrest a convict escaping from the penitentiary, and forthwith convey him to the penitentiary and deliver him to the warden thereof. They shall be allowed eight cents per mile going to and returning from such penitentiary, and such additional compensation as the warden deems reasonable for the necessary expense incurred. (R. S. § 7239; 33 v. 14, §§ 16, 17; S. & C. 918.)

If a constable pursue a fugitive out of the state, he is not entitled to fees for so doing, as he has, in so doing, violated both public and private right. Smith v. Portage Co., 9 O. 25.

Sec. 13606-1. Duty of certain officers when prisoner violates parole.

That when a prisoner is paroled or probated from the Ohio penitentiary or the Ohio state reformatory, and violates any of the conditions of his parole or release, it is hereby the duty of any sheriff, deputy sheriff, chief of police, policeman or police officer, upon his knowing or being advised that such paroled convict is in his bailiwick and has violated the conditions of his parole or release, to forthwith arrest such person, and, if a prisoner from the penitentiary, report same to the Ohio board of administration, at Columbus, and if from the Ohio state reformatory, to the superintendent of the same, and for

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doing no warrant or other authority shall be necessary. (103 v. 94, § 1.)

c. 13607. Summons and indictments against corporations.

When an indictment is returned against a corporation, a summons, mmanding the sheriff to notify the accused thereof returnable on the venth day after its date, shall issue on the precipe of the prosecuting torney. Such summons, with a copy of such indictment, shall be rved and returned in the manner provided for service of summons on such corporation in civil actions. If the service can not be made the county where the prosecution began, the sheriff may make service any county of the state upon the president, secretary, superintendent, erk, cashier, treasurer, managing agent or other chief officer thereof by a copy left at the general or branch office, or usual place of doing siness of such corporation, with the person having charge thereof. ch corporation, on or before the return day of a summons duly rved, may appear by one of its officers or by counsel, and answer to e indictment by motion, demurrer or plea, and upon failure to make ch appearance and answer. the clerk shall enter a plea of "not ilty;" and upon such appearance being made or plea entered, the rporation shall be deemed thenceforth continuously present in court til the case is finally disposed of. (R. S. § 7231; 87 v. 351.)

The word "person" when used in a criminal statute to designate the perpetrator an offense, means a natural person only, and the use of the word will not aurize an indictment against a corporation without any special or further provision to the liability of corporations, or the mode of procedure against them. State v. . Fertilizer Co., 24 O. S. 611.

In Ohio a corporation can not be held criminally liable, in its corporate capacity, unlawfully furnishing to a minor to be drunk by such minor, intoxicating liquors violation of § 6943, Revised Statutes. Ebert Brewing Co. v. State, 2 C. C. N. S. ; 15 O. C. D. 601. Affirmed as to Brewing Co., 71 O. S. 477.

The provision of § 13496 for the arrest of an accused person is not applicable a corporation, but where in a prosecution of a corporation the president is ested and taken before a justice of the peace, failure to take advantage of the egularity by objecting to the jurisdiction of the court amounts to submission its jurisdiction and a general appearance and prevents further question as to isdiction over the defendant corporation on the ground of improper service. inhart & Newton v. State, 26 C. C. (N.S.) 429 (affirming 15 N. P. (N.S.) 92).

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CHAPTER IX.

PROCEEDINGS BETWEEN INDICTMENT AND TRIAL.

SECTION

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WHEN PRISONER INSANE.

Sec. 13608. Whether accused is insane may be tried to a special jury.

When the attorney of a person indicted for an offense suggests to the court in which such indictment is pending, and before sentence, that such person is not then sane and a certificate of a reputable physician to that effect is presented to the court, such court shall order a jury to be impaneled to try whether or not the accused is sane at the time of such impaneling. Thereupon a time shall be fixed for a trial, a jury shall be drawn from the jury-box and a venire issued, unless the prosecuting attorney or the attorney of the accused demand a struck jury, in which case such jury shall be selected and summoned as required by law. The jury shall be sworn to try the question whether the accused is or is not sane and a true verdict give according to the law and the evidence, and, on the trial, the accused shall hold the affirmative. (R. S. § 7240; 72 v. 80, § 1; S. & C. 849.)

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Section 7240, Revised Statutes, requiring a court, upon a trial of a person indicted for a crime, and suggestion by his counsel and physician's certificate of his insanity, to submit the question thereof to a special jury, is mandatory. Rosselot v. State, 13-23 C. C. 370 (affirmed, with opinion, 69 O. S. 91).

Where a court refuses to impanel a special jury to try the question of the insanity of a person on trial for homicide, there being no suggestion in the record that his attorneys did not suggest, nor present a physician's certificate of such fact, but the court determines himself that the defendant is sufficiently sane to proceed with his trial, the accused is denied his statutory right to have his sanity tried by a jury as provided by § 7240, Revised Statutes, for which a verdict of guilty will be reversed. Rosselot v. State, 13-23 C. C. 370 (affirmed, with opinion, 69 O. S. 91).

The provisions of § 7240, Revised Statutes (G. C., §§ 13608, 13609), are mandatory; and the mode therein prescribed for a trial of the question of the present insanity of a person under indictment is premptory and exclusive. State v. Rosselot, 69 O. .S. 91.

When, therefore, at any time before sentence, the insanity of a defendant under indictment is suggested and brought to the attention of the court in which such indictment is pending in the manner provided in § 7240 (G. C., §§ 13608, 13609), it is the imperative duty of the court to order a jury to be impaneled to try such question, and such jury, when so impaneled, shall be specially sworn to try the question whether the defendant is or is not then sane. State v. Rosselot, 69 O. S. 91.

Where counsel for a defendant on trial for murder in the second degree, during the progress of such trial suggests to the court that the defendant is not then sane and presents to the court the certificate of a "respectable" physician to the same effect and demands that a special jury be impaneled to try the question whether or not such defendant is then sane it is error for the court to refuse such demand. And such error is not cured by the court thereafter, in its general charge to the jury trying said case, instructing said jury that: "If you think that you have not heard all of the truth in the case, because of defendant's mental condition and that you believe you are not justified because of that fact in finding him guilty, you may acquit him." State v. Rosselot, 69 O. S. 91.

Where in a trial for homicide the insanity of the accused is set up as a defense, the burden of establishing such defense by a preponderance of the evidence rests upon the defendant. State v.. Austin, 71 O. S. 317.

The law presumes every person sane until the contrary is shown, and in a criminal case this presumption of sanity serves the state as the full equivalent of express proof until such time as it is made to appear by a preponderance of the evidence that the defendant was insane at the time of committing the crime alleged against him. State v. Austin, 71 O. S. 317. .

On the trial of A, indicted for the crime of murder, it having been proved that prior to the commission of the alleged homicide he had twice been adjudged insane and committed to an asylum, but was discharged therefrom the last time nearly two years previous to the time of the homicide, counsel for defendant requested the court to give the jury the following instruction: "Proof of prior insanity throws upon the state the burden of proving the crime perpetrated during a lucid interval. It defeats the legal presumption of sanity and creates a legal presumption of continued lunacy."

Held: Such instruction was properly refused. State v. Austin, 71 O. S. 317.

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Where a verdict is rendered under the act of 1877 (74 v. 339, § 1), finding a prisoner to be sane, error will not lie to review the proceedings previous to the prisoner's conviction of the crime charged. Quaere: Whether alleged errors in such proceedings can be reviewed on error, even after conviction. Inskeep v. State, 35 O. S. 482.

Where a verdict is rendered under this section, finding a prisoner sane, error will not lie to reverse such proceeding for alleged errors therein, even after a conviction. Inskeep v. State, 36 O. S. 145.

Proceedings under this section are not final, and hence not reviewable. Ib.

In a proceeding under this section the accused has the affirmative and he must show by fair preponderance of the evidence that he is not sane. State v. Myers, 7 N. P. 288, 8 O. D. 679.

A test of insanity is not whether the accused knows right from wrong but whether his mind is so deranged that he is not able to realize and understand his relation to his counsel and the case which he is called upon to defend. State v. Myers, 7 N. P. 288, 8 O. D. 679.

The trial provided by this section has nothing to do with determining the sanity of the accused at the time he committed the offense. State v. O'Grady, 3 N. P. 279, 5 O. D. 654.

For decisions on the question of insanity, see notes to § 12400.

Order for jury to try question of insanity.

This day came ———, prosecuting attorney, and also ———, the attorney for the defendant, who suggested to the court that the said E F, the defendant herein, is not sane, and presented to the court certificates to that effect from ——— and ———, reputable physicians. It is therefore ordered by the court that a jury be impaneled to try whether or not the said defendant is sane, and the trial of the said question is set for ———, 19—, at ——— o'clock A. M., to which time it is directed that the *venire* be made returnable.

Entry on the verdict.

This day came the prosecuting attorney on behalf of the state of Ohio, and also the defendant, E F, in the custody of the sheriff and with his attorney; also came the jury heretofore impaneled in this case, to-wit: (give the names of the jurors) who were duly sworn according to law. After hearing the evidence in the case and the charge of the court, the jury retired, and afterwards presented to the court their verdict in writing, as follows:

"We, the jury duly impaneled and sworn to try the question in this case, do find that the defendant, E F, is (or is not) sane and was (or was not) sane at the commencement of this proceeding.

(The verdict should be signed by at least nine of the jurors.)"

Entry and verdict of acquittal.

(Follow the preceding form to the verdict and add) "We, the jury being duly impaneled and sworn, do find the defendant, E F, not guilty as he is charged in the indictment, and we acquit the said defendant on the sole ground that he was not sane at the time of the commission of the offense charged.

N M, Foreman."

Thereupon the defendant is ordered committed to the jail of this county to be dealt with according to law upon a charge of, and proceedings in lunacy.

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13609. Verdict by three-fourths of jury.

f three-fourths of the jurors provided for in the next preceding on, agree upon a verdict, their finding may be returned as the ct of such jury, and a new trial may be granted on the applica- of the attorney of the accused, for the causes and in the manner ded in this title. (R. S. § 7240; 72 v. 80, § 1; S. & C. 849.)

f three-fourths of the jury find the prisoner insane it is sufficient to authorize lict. State v. O'Grady, 3 N. P. 279, 5 O. D. 654.

13610. Proceedings on verdict of such jury.

three-fourths of the jurors do not agree, or the verdict is set another jury shall be impaneled to try the question. If the jury he accused to be sane and no trial has been had on the indictment, l shall be had thereon as if the question had not been tried. If ury find him to be not sane, that fact shall be certified by the clerk probate court, and the accused, until restored to reason, shall be with by such court as upon inquest had. If he is discharged, the given for his support and safe-keeping shall contain a condition when restored to reason, he shall answer to the offense charged in dictment, or of which he has been convicted, at the next term of ourt thereafter and abide the order of such court. (R. S. § 7241; 80, § 1.)

here a verdict is rendered finding a prisoner to be sane, error will not lie, us to or after the prisoner's conviction, to review such proceedings for alleged therein. Inskeep v. State, 35 O. S. 482; 36 O. S. 145.

13611. May be prosecuted when restored to reason.

hen restored to reason, the accused may be prosecuted for an e committed by him previous to such insanity, or sentenced on a ction had previous thereto. (R. S. § 7241; 72 v. 80, § 1.)

13612. Proceedings when accused is acquitted on the sole ground of insanity.

hen a person tried upon an indictment for an offense is acquitted e sole ground that he was insane, such fact shall be found by the in the verdict, and certified by the clerk to the probate court. person shall not be discharged, but forthwith delivered to the te court, to be proceeded against upon the charge of lunacy, and erdict shall be *prima facie* evidence of his insanity. (R. S. § 7242; 81, §§ 55, 56, 57; S. & C. 849, 850.)

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Sec. 13613. Proceedings when accused is restored to reason.

When a lunatic confined in an asylum or an infirmary, under the provisions of the next preceding section or under the provisions of law providing that the probate court shall examine an alleged lunatic who is in jail awaiting examination before a magistrate, is restored to reason, the superintendent having him in charge shall notify the prosecuting attorney of the proper county of such fact, who, within a reasonable time, shall cause the clerk of the court to issue a capias, upon which the accused may be arrested and committed to the jail of the county, to answer the offense charged against him. In default of such capias, such superintendent shall discharge him. (R. S. § 7243; 53 v. 81, § 54; S. & C. 849.)

The record of a probate court showing that four years previous to the commission of a crime the accused was adjudged insane and confined in an asylum is admissible. Wheeler v. State, 34 O. S. 394.

Where it appears in the record of a criminal proceeding that the accused has been regularly found by a jury to be "not sane," before such accused can be put on trial under the indictment, the record should be made to show by an entry by the court that the steps provided for by R. S. § 7243, have been duly taken, and that the condition of the accused has changed from that of one not sane to that of a sane person. Brock v. State, 22 C. C. 364, 12 O. C. D. 467.

Sec. 13614. Person under indictment insane.

If a person under indictment appears to be insane, proceedings shall be had as provided for persons not indicted because of insanity. If such person is found to be insane he shall be committed to the Lima state hospital until restored to reason when the superintendent thereof shall notify the prosecuting attorney of the proper county who shall proceed, as provided by law, with the trial of such person under indictment. (98 v. 239, 241, §§ 13, 25.)

Where a defendant in a criminal case states that he does not desire counsel, and attempts to conduct the defense himself, and it becomes evident that he is mentally incapable of so doing, or understanding the nature of the defense, it becomes the duty of the court to stop the trial, and appoint counsel to defend; and where this was not done, and the trial resulted in the conviction and sentence of the defendant, a reviewing court will reverse the judgment on the ground that virtually there was no trial. Stephenson v. State, 4 O. A. R. 128, 21 C. C. (N.S.) 287.

Sec. 13615. Lima state hospital.

The next preceding section shall not be in force and effect until the Lima state hospital is ready for the reception of inmates as certified to the courts by the governor and secretary of state. (98 v. 241, § 25.)

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PLEAS TO THE INDICTMENT.

13616. Copy of indictment to be served on accused.

'ithin three days after the filing of an indictment for felony, and ery other case when requested, the clerk shall make and deliver to heriff, or to the defendant or his counsel, a copy of such indict- The sheriff, on receiving such copy, shall serve it on such dant. A defendant, without his assent, shall not be arraigned lled on to answer to an indictment until one day has elapsed after ving, or having an opportunity to receive in person or by coun- copy of such indictment. (R. S. § 7244.)

he failure to furnish the accused with a copy of the indictment must, to be ble, be interposed as an objection before trial; and, if waived then, it can not de a ground of error after trial. Smith v. State, 8 O. 294.

n objection that the copy of the indictment served on the defendant is not a opy must be made before going to trial. Case v. State, 12 C. C. 158, 5 O. C. 1.

n omission on the part of the state to furnish the accused with a true copy of dictment, at least twelve hours before trial, as provided by the statute, must, available, be interposed as an objection before trial; and, if waived then, it ot be made a ground of error after trial. Fouts v. State, 8 O. S. 98.

lthough it appears that a different rule once prevailed, yet it has been well l for many years, that it is not requisite that an indictment should set forth mes of the grand jurors. It is essential, however, that the record of the case l show the names of the grand jury by whom the indictment was found. Id.

person charged with crime is not entitled, before, or at the time of trial, minutes of the evidence taken before the grand jury, on which the indict- was found against him, nor to an inspection of a transcript of such evidence. v. Rhoads, 81 O. S. 397.

he court of common pleas is without power in this state to entertain a n by the defendant to inspect the minutes of the grand jury or a transcript by the official stenographer of the testimony taken before the grand jury. v. Haugh, 4 N. P. (N.S.) 79, 16 O. D. 477.

s to when the defendant may demand a bill of particulars in an embezzlement of the acts relied upon for conviction, see State v. Langan, 1 O. D. 261; L. B. 33.

13617. Court to assign counsel to defend indigent prisoner.

fter a copy of the indictment has been served or opportunity had eceiving it, as provided in the next preceding section, the accused be brought into court, and, if he is without and unable to employ sel, such court shall assign him counsel, not exceeding two, who have access to such accused at all reasonable hours. Such counsel not be a partner in the practice of law, of the attorney having ge of the prosecution, and a partner of such attorney shall not be

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employed by, or conduct the defense of, a person so prosecuted. (R. S. § 7245; 77 v. 59, § 1; 71 v. 13, § 1; 72 v. 46, § 1; 76 v. 56, §§ 1, 2; S. & C. 1183; S. & S. 612.)

Where a defendant in a criminal case states that he does not desire counsel, and attempts to conduct the defense himself, and it becomes evident that he is mentally incapable of so doing, or understanding the nature of the defense, it becomes the duty of the court to stop the trial and appoint counsel to defend; and where this was not done, and the trial resulted in the conviction and sentence of the defendant, a reviewing court will reverse the judgment on the ground that virtually there was no trial. Stephenson v. State, 4 O. A. R. 128; 21 C. C. (N.S.) 287.

When an attorney for a defendant abandons his client on the day of trial, and the defendant can not give bond and secure a lawyer to look after his interests until his paid attorney has been found, it is proper for the court to appoint counsel for the defendant, if he has no means to employ a lawyer. State, ex rel., v. Shay, 3 N. P. (N.S.) 657, 16 O. D. 446.

Entry—Counsel assigned.

(Title.) Indictment for ————.

And now the defendant, being brought into court in charge of the sheriff, and it appearing that he is in indigent circumstances, and unable to employ counsel, the court, at his request, appoints R S, Esq., as counsel for his defense.

Sec. 13618. Payment of counsel assigned to cases of felony.

Counsel so assigned in a case of felony shall be paid for their services by the county, and may receive therefor, in a case of murder in the first or second degree, such compensation as the court approves; in a case of manslaughter, not exceeding one hundred dollars, and, in other cases of felony, not exceeding fifty dollars. The auditor of such county shall not draw an order on the treasurer for the payment of such counsel until the amount for such services has been presented to and allowed by the commissioners thereof. (R. S. § 7246; 91 v. 62; 72 v. 46, § 14; 42 v. 28, § 1; S. & C. 94; S. & S. 612.)

From the action of a board of county commissioners under "an act to regulate the fees of attorneys and counselors at law," passed March 4, 1844 (1 S. & C. 94), allowing the claim of counsel assigned to defend an indigent prisoner, counsel, who are not satisfied with the amount allowed, have no right to appeal to the court of common pleas. Commissioners of Geauga Co. v. Ranney et al., 13 O. S. 388.

The amount to be paid is the sum the commissioners, in the exercise of their discretion, may allow subject to the limitations mentioned in this section, although the trial court may approve a different amount, and no right to appeal from their determination to the court of common pleas exists in favor of the attorney who is dissatisfied with such allowance. Long v. Commissioners, 75 O. S. 539.

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See Shepherd v. Commissioners, 8 O. S. 354; State v. Board of Commissioners, O. S. 364.

Entry—Allowance of counsel fees.

(Title.) Indictment for ———.

It is ordered by the court that ———, who was heretofore appointed by the rt to defend the said defendant, E F, be, and he is hereby allowed the sum of — dollars. It is further ordered that the said amount be certified by this court he county auditor and commissioners for allowance and payment, which is done ordingly.

. 13619. Accused to have reasonable time to except.

Thereupon the court shall allow the accused a reasonable time to mine the indictment and prepare exceptions thereto. (R. S. § 7247; v. 304, § 105.)

. 13620. Exception to an indictment.

The accused may except to an indictment by—first, a motion to ash; second, a plea in abatement; and third, a demurrer. (R. S. 248; 66 v. 304, § 106.)

The practice of demurring to the evidence, does not seem to be sanctioned by the minal Code, and the better practice is, to move the court to exclude the evidence, nstruct the jury that it is insufficient. Baker v. State, 31 O. S. 314, 317.

Cited Moore v. State, 13 C. C. 12; 7 O. C. D. 70; *ex parte* McKnight, 48 O. S. , 604; Searles v. State, 6 C. C. 331, 346; Corthell v. State, 11 C. C. 570; 5 O. C. 123.

. 13621. Motion to quash.

A motion to quash may be made where there is a defect apparent on the face of the record, including defects in the form of the in- tment or in the manner in which an offense is charged. (R. S. 249; 66 v. 304, § 107.)

See decision under § 13581.

For further cases on duplicity, see G. C. § 13578.

As to the waiver of the defects not excepted to by a motion to quash, see § 13625.

A motion to quash addresses itself to the sound discretion of the court, and is er granted except in very clear cases; but the defendant is left to raise the ques- in a more formal way, by demurrer or motion in arrest of judgment. The usal to grant can not be regarded as a final decision of the question raised by motion, when the point is one which, if well taken, would be available on urrer, or in arrest of judgment. Indeed, such motion should never be granted the question is in any degree doubtful, but should be reserved for hearing on ion to arrest the judgment. Ex parte Bushnell, 8 O. S. 599.

A judge of the court of common pleas has authority to hold court in any county his district, though not designated by the judges of the district, as provided by

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§ 468 of the Revised Statutes, to hold court in that county; and an indictment found and returned at a term so held is not invalid, either because the judge holding the term was not designated to hold the same, or because the judges of the district failed to apportion the labor of holding the courts among themselves and issue an order specifying the terms to be held by each judge. State v. Thomas, 61 O. S. 444.

Construing § 457 of the Revised Statutes, with § 4446-2, which makes the first Monday in September a holiday to be known as labor day, it is not unlawful to hold the court of common pleas on that day when the judges of the district in the exercise of their powers under the first of these sections, have fixed that day for the commencement of the term; and an indictment found and returned by a grand jury impaneled and sworn on that day is not, on that account, invalid. State v. Thomas, 61 O. S. 444.

Where, after a grand jury has been sworn, a member is discharged on account of sickness and another person having the legal qualifications is sworn in his stead, as provided by § 7202 of the Revised Statutes, and the person so sworn takes his place on the panel, the body so constituted is a legal grand jury, though a foreman be not again appointed, nor the oath readministered to him, or to the other members as a body. State v. Thomas, 61 O. S. 444.

It is not necessary that the records of the court should show how, or by whom, the grand jurors were selected and drawn. The legal presumption is that duty was regularly performed by the proper officers, but if it was not so done, that is not a valid objection to an indictment. State v. Thomas, 61 O. S. 444.

An objection to an indictment on the ground that it is not indorsed as required by § 83 of the criminal code (General Code, § 13572), should be made by a motion to quash, and where the accused, without making such motion, pleads guilty, the objection is waived. Picket v. State, 22 O. S. 405.

Indefiniteness in the averments of an indictment should be taken advantage of by a motion to quash and not by demurrer. State v. Messenger, 63 O. S. 398.

An indictment under § 7075, Revised Statutes (G. C. § 13105), charging the defendant with having unlawfully, knowingly and feloniously made out and presented for payment, and certified as correct to the auditor of a municipal corporation, a false and fraudulent pay roll against said corporation for the purpose of procuring an allowance of the same by said auditor and said corporation, and for the purpose of procuring an order for payment of the same out of the treasury of such corporation, with intent to defraud, sufficiently charges an offense under said section, and a motion to quash the indictment because it does not show authority in the auditor to allow or pay the pay roll should be overruled. State v. Voute, 68 O. S. 274.

An indictment for a violation of § 7027, Revised Statutes (G. C. § 13035), which charges that the accused, at a certain time and in a certain county, "unlawfully did have in his possession two hundred and twenty-one copies of a certain article of an indecent and immoral nature, to-wit, a certain printed pamphlet of an indecent and immoral nature, entitled "Circular Number One—A Biographical Sketch of a Few Short Skate Politicians," for the purpose of giving away, exhibiting and publishing the said pamphlet, which said pamphlet is so indecent and immoral in its nature that the same would be offensive to the court and improper to be placed upon the records thereof," is sufficient in law, without containing a copy of the alleged indecent and immoral pamphlet. State v. Zurhorst, 75 O. S. 232.

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n indictment framed under § 6835, Revised Statutes (G. C. § 12437), as ed and passed April 9, 1908, which, in all other respects, sufficiently describes arges an attempt to break and enter an inhabited dwelling house with intent mit a felony, will not be held bad for omission to designate and define the ular felony intended to be committed. State v. Groves, 80 O. S. 351.

motion to quash an indictment should not be sustained unless the defect erfection complained of is of such nature as to tend to the prejudice of the ntial rights of the defendant upon the merits of the case. Fisher v. State, S. 360.

e overruling of a motion to quash an indictment will not be regarded as a lecision of the question presented thereby, when the point is one that, if aken, would be available on demurrer or upon motion in arrest of judgment. arte Bushnell, 8 Ohio St., 599, approved and followed.) Fisher v. State, S. 360.

Pleadings" do not embrace motions to quash, but include the indictment and in abatement as well as in bar. Wagner v. State, 42 O. S. 537.

n objection that it does not appear in the record that the indictment was nted by the foreman to the court," in accordance with R. S. § 7210 (G. C. 5), is waived by the plea of not guilty, where there was no motion to quash. . State, 36 O. S. 615.

e failure of the foreman of a grand jury to describe himself as such in ing an indictment is not sufficient ground for sustaining a motion to quash. g v. State, 48 O. S. 220.

n objection to an indictment that it is not signed by the prosecuting attorney, omission constitutes a defect at all, is waived by pleading the general issue t having first moved to quash. Riflemaker v. State, 25 O. S. 395.

n indictment which charges that the accused on a specified day received and led different chattels which had been stolen from different owners, is not r duplicity. Smith v. State, 59 O. S. 350.

an indictment for burglary by breaking into the office of a railroad com- failing to allege that the company was incorporated is not sufficient ground staining a motion to quash. Burke v. State, 34 O. S. 79; Hamilton v. State, S. 82.

record does not show impaneling of grand jury, a motion to quash will oung v. State, 23 O. S. 577.

here no affidavit has been filed, a motion to quash the information lies. rodt v. State, 50 O. S. 192.

motion to quash an indictment charging perjury by a witness testifying a grand jury, where the indictment does not show affirmatively upon its at such witness was not advised by the grand jury of his constitutional right use to testify in a matter affecting his own conduct, and that does not atively show upon its face that such witness did not waive his constitutional ge and voluntarily testify, presents no question of the invasion or denial of nstitutional right of the witness under § 10 of Article I of the constitution. v. Cox, 87 O. S. 313.

efects in form. Carper v. State, 27 O. S. 572.

advantage of the defects is not taken by motion to quash, the error is l. Bartlett v. State, 28 O. S. 669.

he defendant in a criminal cause who desires to object to an indictment e of defects apparent upon the face of the record, relating to the form or r in which the offense is charged, must do so by a motion to quash. By ring, pleading in bar, or by pleading to the general issue, he is held to have l the defects which might be taken advantage of by a motion to quash. v. Schultz, 96 O. S. 114.

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If the indictment charges four separate and distinct offenses, a motion to quash it on this ground was not the remedy of defendant. Such joinder may be made in proper cases known to the law, and if it be made to appear to the trial court that the defendant would be prejudiced by having to defend himself in one case, against several separate and distinct charges, the prosecuting attorney, on the motion of the defendant, should be required to elect upon which count or counts he would proceed. Myers v. State, 4 C. C. 570; 2 O. C. D. 712.

Where it is necessary in an indictment to charge a criminal intent, if the intent be charged, but not with clearness, the remedy is by motion, and not by demurrer. Searles v. State, 6 C. C. 332; 3 O. C. D. 478.

A charge in an indictment that the defendant, with two other defendants, then and there held a pistol and "discharged and shot it off against and upon the deceased," is not objectionable as in the very nature impossible; and not a ground for motion to quash. Jones v. State, 14 C. C. 35; 7 O. C. D. 305.

A charge that the murder was committed by all three defendants, without an allegation that one of them committed the crime, is proper. Jones v. State, 14 C. C. 35; 7 O. C. D. 305.

Where two are jointly indicted, and one of them files a motion to quash the indictment, while the other files a demurrer to the indictment, both of which the overruled, the defendant who had filed the demurrer, can not, on error, take advantage of the error of the court below in overruling the motion to quash filed by his codefendant. To avail himself of such error, he should have joined in the motion to quash, or have filed one in his own behalf. Jones v. State, 14 C. C. 363; 7 O. C. D. 716.

A motion to quash an indictment, which, with other proper averments, charges that three defendants unlawfully made an assault upon another person, and did then and there unlawfully have carnal copulation against nature with such person, will not lie for uncertainty, repugnancy and duplicity. Foster v. State, 1 C. C. 467; 1 O. C. D. 261.

Technical defects and irregularities in selecting, drawing, summoning and impaneling of the grand jury which do not affect the competency of the persons to act, can not be reached by motion to quash the indictment, but must be availed of by challenge. Blaney v. State, 17 C. C. 486; 9 O. C. D. 616.

The insufficiency of an indictment must be raised by motion to quash or by demurrer, it can not be raised by a plea in abatement. Stahl v. State, 11 C. C. 23; 5 O. C. D. 29.

See § 11436 (R. S. § 5175), cited on the question on error in overruling the motion to quash the indictment. McCarthy v. State, 5 C. C. 627; 3 O. C. D. 306 (affirmd 27 W. L. B. 332).

A plea of not guilty waives all defects in an indictment which might otherwise be excepted to by a motion to quash. Moore v. State, 13 C. C. 10; 7 O. C. D. 70.

After the defendant has plead to the indictment, and the trial of the cause has begun, it is too late to raise objections to defects in the indictment as to its form or to the manner in which the crime is charged. Newberry v. State, 15 C. C. 208; 7 O. C. D. 622.

A defendant in a criminal case is never allowed to withdraw his plea of not guilty for the purpose of moving to quash the indictment for irregularity. If such

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egularity exist, it may be taken advantage of on motion to arrest the judgment. ate v. Decker, 10 W. L. J. 328.

A demurrer to an indictment filed before a motion to quash or a plea in abatent is presumed to admit the facts as stated in the indictment, and such motion plea will not be allowed thereafter. Corthell v. State, 11 C. C. 570; 5 O. C. D. .

An indictment, drawn under § 6820 (G. C. § 12420), charging the accused with ent to wound, maim and kill, is not bad for duplicity because these offenses are rged in one count and in the conjunctive. Limber v. State, 9 C. C. (N.S.) 177; O. C. D. 761.

A motion to quash is the proper procedure to point out the defects of duplicity l indefiniteness in an indictment, and failure to file such a motion and entry of eneral plea to the indictment is a waiver of those defects. Arnsman v. State, 11 C. (N.S.) 113; 20 O. C. D. 445.

An indictment, the first count of which charges the accused as principal with ning a building in 1804, and the second with aiding and abetting another in the e crime in 1894, is not bad for duplicity and indefiniteness, inasmuch as the date the first count was clearly a mistake; and no substantial right of the accused ng prejudiced under Revised Statutes § 7215 (G. C. § 13581), a motion to quash properly overruled. Van Immons v. State, 12 C. C. (N.S.) 417; 19 O. C. D. 681; firmed 72 O. S. 678).

An indictment under G. C. § 12420, charging the accused with shooting with ent to wound, maim and kill, is not bad for duplicity. Limber v. State, 9 C. (N.S.) 177, 18 O. C. D. 761.

The summoning of a grand juror under the wrong initials is a misnomer only, is not an irregularity of which advantage may be taken by a plea in abatement. ch v. State, 5 O. A. R. 16; 25 C. C. (N.S.) 230.

Under the present rules for pleading in criminal cases, which require only sonable certainty in an indictment, the fact that the pleader might have been ttle more explicit in his statement as to why the instrument alleged to have used in committing the homicide could not be more fully described, does constitute ground for quashing the indictment. Lynch v. State, 5 O. A. R. 16; C. C. (N.S.) 230.

An indictment need not be signed by the prosecuting attorney. Jones v. State, C. C. 35, 7 O. C. D. 305.

When the prosecutor elected upon which indictment he desired to proceed, it the imperative duty of the trial judge (defending here) to enter the election n the minutes of the court without waiting to pass upon this motion to quash. te ex rel., v. Dickson, 14 C. C. (N.S.) 247.

A motion to quash does not lie to an indictment to which the foreman of the nd jury did not sign his full name. State v. Henry, 9 N. P. (N.S.) 254.

Indefiniteness in the averments of an indictment should be taken advantage of a motion to quash and not by demurrer. State v. Messenger, 63 O. S. 398; te v. Morrill, 5 N. P. 133, 7 O. D. 52.

Where a mayor has final jurisdiction a motion to quash will not lie. Schlagel v. te, 3 N. P. (N.S.) 429, 16 O. D. 295.

A motion to quash is addressed to the sound discretion of the court, and should be granted except in very clear cases, since the defendant may raise the stions in a more formal way by demurrer or by motion in arrest of judgment.

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It has been said that a motion should never be granted if the questions are in any degree doubtful. State v. Henkel, 11 N. P. (N.S.) 97, 22 O. D. 735.

Motion to quash.

(Title.) Indictment for ———.

The said E F moves the court to quash said indictment, by reason of certain defect (or, certain defects) apparent upon the face of the record, in this, to-wit, (state the defect or defects). J S, Attorney for Defendant.

Remark.—The statute does not require the motion to quash to be in writing, but it is better that it should be.

Sec. 13622. Plea in abatement.

A plea in abatement may be made when there is a defect in the record shown by facts extrinsic thereto. (R. S. § 7250; 66 v. 304, § 108.)

General Code § 13625 provides that defects that may be taken advantage of by plea in abatement are waived by demurrer or pleading in bar or the general issue.

General Code § 13626 provides that when a misnomer is pleaded by the defendant he must set out his true name.

General Code § 13631 requires a plea in abatement to be in writing, signed by the accused, and sworn to before a competent officer.

Contradicting record.—A plea impeaching the conduct of the grand jury, and alleging facts in contradiction to the journal of records, can not be permitted. Turk v. State, 7 O. 528.

Matter of defense.—It is not correct practice to plead specially to an indictment, a matter which is competent and proper by way of defense, under the plea of not guilty; but if the state demur generally, or take issue on any such special plea, the irregularity is thereby waived. Hirn v. State, 1 O. S. 15.

In the police court of Cincinnati, the defendant having filed a plea setting forth matter of defense merely, it was not error in the judge, without passing on this plea, to direct a plea of not guilty to be filed, the accused standing mute, and to proceed with the trial, when the evidence heard under the plea of not guilty could have no other or different result, if based under the plea which defendant did file. Billigheimer v. State, 32 O. S. 435.

Disqualification of grand juror.—It is a good cause for a plea in abatement that one of the grand jurors who found the indictment had not the necessary qualifications of a grand juror. But mere irregularities in selecting and drawing grand jurors, which do not relate to or affect their personal qualifications as such, must be taken advantage of, if at all, by challenge for cause, and can not be so pleaded in abatement. Doyle v. State, 17 O. 222; Huling v. State, 17 O. S. 583.

The plaintiff was indicted for violation of the act to provide against the evils resulting from the sale of intoxicating liquors. He plead in abatement, that one of the grand jurors who found the bill of indictment was a justice of the peace. To this plea a demurrer was filed on behalf of the state, and sustained by the court. The plaintiff then entered a plea of not guilty, and was tried, convicted, and sentenced. He sought to reverse the judgment of the court, on the ground that

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ere was error in sustaining the demurrer to his plea in abatement. By the ourt: We see no error. The provision in the "act relating to juries" (70 v. 173, 21), exempting public officers and others from service as jurors, does not have e effect to disqualify the persons so exempted, but merely extends to such rsons a privilege, which may be waived by them. Glassinger v. State, 24 O. 206.

It is not a good plea to an indictment for murder that a member of the grand ry which found such indictment was a nephew of the person who was murdered. ate v. Easter, 30 O. S. 542.

That a person has subscribed funds for the purpose of legitimately suppressing ime does not disqualify him from sitting on the grand jury; nor is it a ground disqualification that he has evinced a desire and purpose to enforce the laws. och v. State, 32 O. S. 353.

The fact that township trustees caused one of their number to be returned as and juror does not disqualify him from serving as such. Koch v. State, 32 O. S. 3.

The provision in § 5164 of the Revised Statutes, as amended April 29, 1885 2 v. 166), that the trustees of the township shall select to be returned for jurors rsons who have not served as a regular juror in any court of record in the county ring two years last past, does not so far disqualify persons who have so served a regular jury, as to render invalid indictments found by grand juries of which ey were members. State v. Elson, 45 O. S. 648.

It is not a good plea in abatement to an indictment that one of the grand rors has served as a talesman juror within twelve months next preceding the rm at which such indictment was found. § 5176 of the Revised Statutes applies the trial of cases to a petit jury only. Roth v. State, 3 C. C. 59; 2 O. C. D. 33.

Impaneling grand jury.—Mere irregularities in drawing or selecting grand rors, or the want of record of such drawing and selecting, no objections being made to their qualifications to act as such, can not be taken advantage of by plea in atement. Blair v. State, 5 C. C. 496; 3 O. C. D. 242.

Defects in selecting, drawing and summoning a jury, either grand or petit, is ground of challenge to the whole array, or of individual members, but it is not ailable on a plea in abatement. Blaney v. State, 17 C. C. 486, 9 O. C. D. 616.

The irregularity in the selection of the grand jury can not be attacked by a a in abatement. Deiter v. State, 12 C. C. (N.S.) 97.

The summoning of a grand juror under the wrong initials is a misnomer only, d is not an irregularity of which advantage may be taken by a plea in abatement. nch v. State, 23 C. C. (N.S.) 230.

A plea in abatement does not lie to an indictment for murder in the first gree, where based on the ground that the judges of the common pleas court in pointing the jury commission failed to designate the number of names which the nmission should place in the jury wheel of persons to serve as grand and petit rors during the current year. State v. Cleveland, 9 O. L. R. 203.

It is not reversible error for the trial court to refuse to hear and decide a a in abatement based on the disqualification of a grand juror, until after e return of a verdict, no substantial right of the defendant being prejudiced ereby. Bell v. State, 7 O. A. R. 185.

Extradition—Different offense.—A person extradited under the provisions the treaty of 1842, between the United States and Great Britain, can not be tained in custody and prosecuted for a different crime than the one specified in e warrant of extradition. The provisions of this treaty are part of the law of the nd, enforcible by the judicial tribunals of this state, in behalf of a person so deined and prosecuted. State v. Vanderpool, 39 O. S. 273.

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A person surrendered to the authorities of this state by another state or territory on extradition proceedings can not, while held in custody thereunder, be lawfully tried for a different crime than the one upon which his extradition was obtained, unless he voluntarily waives his privilege. Ex parte Hiram P. McKnight, 48 O. S. 588.

Miscellaneous.—Errors in the charge to the grand jury can not be reached by a plea in abatement. Stahl v. State, 11 C. C. 23, 5 O. C. D. 29.

The insufficiency of an indictment to charge a crime must be raised by motion to quash or by demurrer; it can not be raised by a plea in abatement. Stahl v. State, 11 C. C. 23, 5 O. C. D. 29 (reversed on other grounds, Knight, et al., v. State, 54 O. S. 365).

After a verdict of guilty, and judgment reversed on account of error in the proceedings, the prisoner is not protected from a second trial before a jury, by the provisions in the Bill of Rights, that "the accused shall not be twice put in jeopardy for the same offense." Sutcliffe v. State, 18 O. 469.

An objection that it does not appear in the record that the indictment found by the grand jury was "presented by the foreman to the court," in accordance with § 7210, Revised Statutes, is waived by the plea of not guilty, where there was no motion to quash. Kerr v. State, 36 O. S. 615.

Where the foreman of the grand jury has failed to sign the indictment with his full name, the proper method of taking advantage of the supposed defect would be by plea in abatement. State v. Henry, 9 N. P. (N.S.) 254.

A matter such as the failure of a foreman of a grand jury to sign his full name to an indictment is extrinsic to the indictment, and the proper method of reaching the defect is by a plea in abatement. State v. Henry, 9 N. P. (N.S.) 254.

A plea in abatement is the proper way to reach an indictment for misnomer of the defendant. Smith v. State, 8 O. 294.

In criminal procedure at common law, if a party is indicted by any other than his true name he may for plea in abatement of the action say that it is not his true name—that there is a misnomer in the indictment, but he must first give in such plea his true name. State v. Miller, 13 C. C. 67; 7 O. C. D. 552.

Where the defendant pleads in abatement a misnomer, alleging that he was baptized and has always been known by another name, and issue is taken on the question of baptism, proof that he has always been known by another name, will not sustain the plea. Davenport v. James, 1 W. L. J. 160.

Where an indictment contained three counts, the first two not charging that the offense was committed "against the peace and dignity of the state of Ohio," but the third did so charge, a conviction under the third count is good, although an acquittal be had under the first two counts, if it did not appear from the record that evidence had been introduced against the prisoner under the first two counts which would have been incompetent and prejudicial under the third. Ridenour v. State, 38 O. S. 272.

A plea in abatement to an indictment, while not required to be worded with the strictest technical and verbal accuracy, yet the matter pleaded therein must be clearly and distinctly stated, and must embrace facts as distinguished from conclusions. Hence a plea which states that the defendant was required, against his will, to take an oath and give testimony before the grand jury concerning a case then being investigated against the defendant and his co-defendants, but which does not state how he was thus compelled to take an oath, nor that he refused to take it, nor that

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imed his privilege of refusing to testify, and which fails to show what he tes-
to, or that his testimony was material concerning any fact necessary to be
by the state to justify the finding of an indictment, or that there was not
ony other than that of defendant before the jury sufficient to justify such in-
ent, is bad on general demurrer. Lindsey v. State, 69 O. S. 215.

here is neither constitutional nor statutory prohibition on the power of the
to continue the term into another judicial year, if the public business so
d, so long as the time to which it continues does not interfere with the order
judges, made in their annual October session, fixing the terms and the time
ich such terms shall begin. State v. Rohrer, 90 O. S. 167.

otion to quash and plea in abatement are waived by the filing of a demurrer.
ell v. State, 11 C. C. 570, 5 O. C. D. 123.

n objection that the copy of the indictment served on the defendant was not
copy must be made before going to trial. Case v. State, 12 C. C. 158, 5 O.
194.

plea in abatement to an indictment alleging that the grand jury which re-
the indictment did not have before it or within the knowledge of its members
vidence connecting the defendant with the crime alleged, does not set up a
in the record by facts extrinsic thereto, and a demurrer to such a plea must
ore be sustained. State v. Schroder, 16 N. P. (N.S.) 265.

plea of abatement must be made prior to the plea of not guilty, and where
liscovered during the taking of testimony that the prosecuting witness has
ncorrectly named in the indictment it is too late to interpose a plea of abate-
State v. Detterline, 15 N. P. (N.S.) 433, 25 O. D. 420.

he facts relied upon must be pleaded with exactness. Wagner v. State, 42 O.
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ited, Whiting v. State, 48 O. S. 220, 231; Searles v. State, 6 C. C. 331, 346;
ell v. State, 11 C. C. 570, 572, 5 O. C. D. 123.

Form for plea in abatement.

Title.) Indictment for ———.

he said E F says that the said State of Ohio ought not further to prosecute
id indictment against him, because he says that (state the matter of the plea).
his he, the said E F, is ready to verify; wherefore, he prays judgment, and
y the court he may be dismissed and discharged from the said premises in
id indictment specified. E. F.

worn to and subscribed before me, this ——— day of ———, A. D. 19—.
D N, Clerk C. C. P., ——— County.

13623. Demurrer.

he accused may demur when the facts stated in the indictment
ot constitute an offense punishable by the laws of this state, or
the intent is not alleged and proof thereof is necessary to make
he offense charged. (R. S. § 7251; 66 v. 304, § 109.)

eneral Code § 13625 provides that a demurrer waives all defects which may
epted to by a motion to quash or plea in abatement.

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A demurrer or a motion in arrest of judgment may be filed after a motion to quash has been overruled. Bushnell, ex parte, 8 O. S. 599.

Where the indictment does not allege that the offense was committed in the county where the indictment is found, a demurrer should be sustained. Stahl v. State, 54 O. S. 365.

If a demurrer is sustained the prisoner should be discharged. Winnett v. State, 18 C. C. 515, 10 O. C. D. 245 (affirmed, without report, 62 O. S. 650).

The accused may demur to an information when the facts stated therein do not constitute an offense. Davis v. State, 32 O. S. 24.

Indefiniteness in the averments of an indictment should be taken advantage of by a motion to quash and not by demurrer. State v. Messenger, 63 O. S. 398.

A criminal charge should be preferred with such certainty and precision as will reasonably apprise the party charged of that which he may expect to meet and be required to answer, and so that the court and jury may know what they are to try and the court may determine without unreasonable difficulty what evidence is admissible; also that the record to be made will be sufficiently definite to make it clear of what the party has been put in jeopardy. Du Brul v. State, 80 O. S. 52.

An indictment brought under § 7075, Revised Statutes, charging the presentation to the county commissioners of a false and fraudulent claim and obtaining payment of the same by the county treasurer which in describing the claim avers it to have been "a certain false and fraudulent claim," but in no way avers wherein it was false and fraudulent, and states no facts showing that it was false or fraudulent, is bad on demurrer and will not support a conviction. De Brul v. State, 80 O. S. 52.

Section 7076, Revised Statutes (G. C., § 13104), which makes it an offense to obtain by any false pretense, and with intent to defraud, any thing of value, applies to a charge for obtaining by false pretense, with intent to defraud, title to real estate situate in this state. State v. Toney, 81 O. S. 130.

An indictment which apprises the party charged of the charge against him so that he may know from the language of the instrument what he is expected to meet and will be required to answer, alleges sufficient matter to indicate the crime and the person charged and is not void for uncertainty. State v. Toney, 81 O. S. 130.

Where it is necessary in an indictment to charge a criminal intent, if the intent be charged, but not with clearness, the remedy is by motion, and not by demurrer. Searles v. State, 6 C. C. 332; 3 O. C. D. 478.

A demurrer filed before a motion to quash or a plea in abatement, is presumed to admit the facts as stated in an indictment, and such motion or plea will not be allowed thereafter. Corthell v. State, 11 C. C. 570; 5 O. C. D. 123.

Where two are jointly indicted, and one of them files a motion to quash the indictment, while the other files a demurrer to the indictment, both of which are overruled, the defendant who had filed the demurrer cannot, on error, take advantage of the error of the court below in overruling the motion to quash filed by his co-defendant. To avail himself of such error, he should have joined in the motion to quash, or have filed one in his own behalf. Jones v. State, 14 C. C. 363; 7 O. C. D. 716.

The provisions of § 7079, Revised Statutes, making it punishable to convey land without title, are not repugnant upon the ground that by their terms it is made an offense to convey land where the party conveying has no title. To execute to another

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trument in the form of a conveyance of land, with intent to defraud, is the nhibited in the section. Kerr v. State, 36 O. S. 614.

indictment which, with other proper averments, charges that three defend- nlawfully made an assult upon another person, and did then and there unlaw- ave carnal copulation against nature with such person, is a good indictment the act of May 4, 1885 (82 v. 241); and a motion to quash the same, on the that it is bad for uncertainty, repugnancy, and duplicity, and a demurrer , for the reason "that the facts stated therein do not constitute an offense able by the laws of this state," were properly overruled. Foster v. State, 1 67, 471.

a criminal case a general demurrer under § 7251, Revised Statutes (G. C.), raises the question of whether intent has been alleged, and proof of it is ry to make out the offense charged. Rosenbloom v. State, 19 C. C. (N.S.) 23.

an indictment under § 6958, Revised Statutes (G. C. § 12450) for receiving goods, an intent to defraud is sufficiently alleged by the use of the words fully and fraudulently." Rosenbloom v. State, 19 C. C. (N.S.) 23.

demurrer to a plea in bar to an indictment should be sustained where it s from the plea that the offense charged in the indictment and the offense of the defendant claims to have theretofore been acquitted, convicted or pardoned the same offense. Griffith v. State, 93 O. S. 294.

ider G. C. § 13681 and the following sections, the prosecuting attorney may to the supreme court the question of the propriety of the action of the n pleas court in sustaining a demurrer to an indictment. State v. Cameron, S. 214.

here an indictment charges no offense, the defendant may avail himself there- nough neither a demurrer or a motion in arrest was filed. Geiger v. State, 283, 3 O. C. D. 141.

e proper method of raising the question of the constitutionality of a statute lemurrer and not by a motion to quash. State v. Bateman, 7 N. P. 487, 10 8.

defendant in a criminal proceeding who has filed a motion to quash the ation does not waive any rights by demurring thereto after such motion to is overruled. Reinhart & Newton Co. v. State, 15 N. P. (N.S.) 92, 23 O. D.

Demurrer to indictment

Title.) Indictment for ———.

e said defendant, E F, demurs to the indictment (or first count, etc., there- r the following reasons:

rst. Because the facts stated therein do not constitute an offense punishable laws of this state.

cond. Because the intent is not alleged therein, proof of such intent being ry to make out the offense charged. J S, Attorney for Defendant.

Entry on demurrer to indictment

Title.) Indictment for ———.

his day this cause came on for hearing upon the demurrer of the defendant the indictment heretofore found herein, and was argued by counsel and sub- to the court, and upon consideration the court finds that the demurrer is* well and does therefore sustain the same, and this proceeding is therefore dis- and the defendant discharged.

If the demurrer is overruled, follow the preceding form to the * and add): ell taken, and the court does overrule the same, to which finding and over- the said defendant E F at the time excepted, the said defendant being t in court in his own proper person, and by his attorney. (Here may be : thereupon the said defendant was arraigned upon the said indictment and for ea thereto says that he is not guilty in the manner and form as charged in dictment. Or add: and thereupon the said defendant requested further time arraigned and to enter his plea to said indictment, which was granted by the)

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Sec. 13624. Accused not discharged when indictment quashed, etc.

When a motion to quash or a plea in abatement is adjudged in favor of the accused, he may be committed or held to bail in such sum as the court requires for his appearance at the first day of the next term of such court. (R. S. § 7252; 66 v. 304, § 110.)

If a special plea to an indictment be determined to be sufficient, the judgment of the court should be respondeat ouster; as in this state the court could not proceed to final judgment in a criminal case without either a plea of guilty or a finding by a jury. Hirn v. State, 1 O. S. 15.

Entry—Indictment quashed Prisoner committed.

(Title.) Indictment for ———.

And now this cause coming on for hearing on the motion of the defendant to quash the said indictment, the court being fully advised in the premises, † grants the same. The court further orders that said defendant * be committed to the custody of the sheriff.

Entry—Indictment quashed—Prisoner bailed.

(Title.) Indictment for ———.

(As in last to *, and continue:)—be held to bail in the sum of ——— dollars for his appearance at the first day of the next term of this court, to answer the charge against him; and in default thereof, that he be committed to the custody of the sheriff.

(If the recognizance is at once given, add:)

And thereupon the defendant, with J H as his surety, entered into recognizance in accordance with the above order.

Entry—Motion to quash overruled.

(Title.) Indictment for ———.

(Follow first form to †, and continue:)—overrules the same.

Entry—Plea in abatement sustained—Prisoner committed.

(Title.) Indictment for ———.

And now this cause coming on for hearing on the plea filed by the defendant, it is considered and adjudged by the court that the said defendant be not compelled to answer said indictment. The court further orders that said defendant * be committed to the custody of the sheriff.

Entry—Plea in abatement sustained—Prisoner bailed.

(Title.) Indictment for ———.

(As in preceding form to *, and continue:)—be held to bail in the sum of ——— dollars for his appearance at the first day of the next term of this court, to answer the charge against him; and in default thereof that he be committed to the custody of the sheriff.

(If the recognizance is at once given, add:)—

And thereupon the defendant, with J H, as his surety, entered into recognizance with the above order.

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. 13625. Accused shall be taken to have waived, etc.

The accused shall be taken to have waived all defects which may excepted to by a motion to quash or a plea in abatement, by de-rring to an indictment or pleading in bar or the general issue. S. § 7253; 66 v. 304, § 111.)

Defects in form.—An objection that an indictment is not indorsed as re-ed by G. C. § 13572 should be made by a motion to quash; and where the sed without making such motion pleads guilty the objection is waived. Picket tate, 22 O. S. 405.

Under the criminal code, where a defendant has been convicted and sentenced n indictment duly returned by the grand jury, he can not, on error, avail him-for the first time of the objection that the record omits to show the impaneling e grand jury. Such objection should be made in the court below, by motion to h, before the pleading to the indictment. Young v. State, 23 O. S. 577.

An objection to an indictment that it is not properly signed at the end thereof he prosecuting attorney of the county, if such omission constitutes a defect at is waived by pleading the general issue, without having first moved to quash. maker v. State, 25 O. S. 395.

Defects in the form of an information or in manner in which an offense is ged, must be reached by motion to quash. Objections which are ground for motions must be taken advantage of in the manner prescribed, or they will be ed waived. After plea, verdict, and judgment, they can not be raised for the time on error. Bartlett v. State, 28 O. S. 669.

An objection that it does not appear in the record that the indictment found he grand jury was "presented by the foreman to the court" in accordance with Revised Statutes, § 7210, is waived by the plea of not guilty, where there was no on to quash. Kerr v. State, 36 O. S. 615.

Defects in charging offense.—Indefiniteness is properly attacked by a on to quash and is waived by demurrer. State v. Messenger, 63 O. S. 398.

Filing demurrer waives right to object on the ground of duplicity, as a motion uash is the proper remedy. Jones v. State, 14 C. C. 363, 7 O. C. D. 716.

Duplicity and indefiniteness must be attacked by a motion to quash. An entry general plea to the indictment is a waiver of those defects. Arnsman v. e, 11 C. C. (N.S.) 113, 20 O. C. D. 445.

An indictment for burglary which does not properly describe the building may ttacked by a motion to quash, but where the accused pleads "not guilty" he es such defect. State v. Pohl, 13 O. D. 386.

Waiver.—A demurrer is presumed to admit the facts as stated in an indict-, and after it is filed neither a motion to quash, nor a plea in abatement will Corthell v. State, 11 C. C. 570, 5 O. C. D. 123.

Where a plea of not guilty was entered, and the record does not show that it subsequently withdrawn, a motion to quash can not thereafter be made. Moore tate, 13 C. C. 10, 7 O. C. D. 70.

After the defendant has pleaded to the indictment and the trial of the cause gun, it is too late to raise objections to any faults in the indictment amounting ere defects in form or in the manner of charging the offense. Newberry v. e, 15 C. C. 208, 7 O. C. D. 626.

Defects in the form of an indictment or in the manner in which an offense arged must be reached by a motion to quash or they will be deemed waived. r plea, verdict, and judgment they can not be raised for the first time on error. lett v. State, 28 O. S. 669.

By a plea of guilty the defendant waives the right to object to any defects that t have been taken advantage of by a motion to quash, or by plea in abatement. r such plea, such matters only as may be taken advantage of by motion in arrest dgment can be interposed to prevent sentence. Carper v. State, 27 O. S. 572.

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The defendant in a criminal cause who desires to object to an indictment because of defects apparent upon the face of the record, relating to the form or manner in which an offense is charged, must do so by a motion to quash. By demurring, pleading in bar, or by pleading to the general issue, he is held to have waived the defects which might be taken advantage of by a motion to quash. State v. Schultz, 96 O. S. 114.

A defendant in a criminal case in never allowed to withdraw his plea of not guilty for the purpose of moving to quash the indictment for irregularity. If such irregularity exist, it may be taken advantage of on motion to arrest the judgment. State v. Decker, 1 Dec. Rep. 527, 10 W. L. J. 328.

Where a plea of not guilty is withdrawn for the purpose of demurrer or the filing of a motion, its withdrawal is not absolute, but merely suspends the effect of the plea until the questions which have been interposed have been determined, and a determination adverse to th claim of the defendant restores the plea and the issue which it raised between the state and the defendant, and it is not error in such case to proceed with the trial without the entering of a second plea. Andrews v. State, 15 C. C. (N.S.) 241, 23 O. C. D. 564 (leave to file petition in error refused, 57 Bull. 520).

A person surrendered to the authorities of this state by another state or territory on extradition proceedings can not, while held in custody thereunder, be lawfully tried for a different crime than the one upon which his extradition was obtained, unless he voluntarily waives his privilege.

The privilege is not waived by failure to plead it in abatement of the indictment for such different crime, nor by entering a plea of not guilty thereto, when, before the trial, the accused asserts his privilege and objects to the trial on that ground. Ex parte Hiram P. McKnight, 48 O. S. 588.

By filing a demurrer the right to file a plea in abatement is waived. Harlow & Krebs v. State, 1 N. P. (N.S.) 323.

If the president of a corporation is arrested on a complaint against the corporation for violation of a penal statute, and if the corporation thereafter files a motion to quash on grounds other than that a lack of jurisdiction of the person, this is a voluntary appearance of the corporation and the justice has jurisdiction. A motion to quash because the justice has no jurisdiction of the person of the defendant and of the subject-matter is an appearance, though the defendant states it appears solely for the purpose of the motion. Reinhart & Newton Co. v. State, 15 N. P. (N.S.) 92, 23 O. D. 500.

A plea of abatement must be made prior to the plea of not guilty, and where it is discovered during the taking of testimony that the prosecuting witness has been incorrectly named in the indictment it is too late to interpose a plea of abatement. State v. Detterline, 15 N. P. (N.S.) 433, 25 O. D. 420.

See notes under §§ 13621, 13622 and 13623.

Sec. 13626. Misnomer.

If the accused plead in abatement that he is not indicted by his true name, he must plead his true name which shall be entered on the minutes of the court. After such entry, the trial and proceedings on the indictment shall be had against him by that name, referring also to the name by which he is indicted, in a like manner as if he had been indicted by such true name. (R. S. § 7254; 66 v. 304, § 112.)

For cases on misnomer, see note to G. C. § 13622.

This section is not in contravention of Art. I, § 10, of the constitution of this state, providing that except in cases therein specified, "no person shall be held to answer for a capital or otherwise infamous crime, unless on presentment or indictment of a grand jury." Lasure v. State, 19 O. S. 43.

An indictment designating the accused by initial letters, as a baptismal name, is good after verdict. Smith v. State, 8 O. 294.

A plea of misnomer, if sustained, does not entitle a defendant to a discharge. State v. Miller, 13 C. C. 67, 7 O. C. D. 552 (affirmed, without report, 55 O. S. 685).

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An indictment designating the accused by initial letters, as a baptismal name, is good after verdict. Smith v. State, 8 O. 294.

See § 13631.

See notes under § 13622.

Plea in abatement for misnomer.

The State of Ohio
v.
E. F.
} Indictment for ———.

E F, who is indicted by the name of C D, in his own proper person comes into court here, and having heard the same indictment read, says that his own proper name is E F and not C D, and that he is, and always has been since his early infancy known by the name of E F, and that he never was known by the name of C D as by said indictment is supposed, and that this he, the said E F, is ready to verify, and the said E F prays that the proceedings herein be had in his true name of E F. E F.

The State of Ohio, ——— county, ss.

E F, the defendant above named, being duly sworn, according to law, deposes and says that all the statements and averments of the foregoing plea are true. E F.

Sworn to and subscribed before me, this ——— day of ———, A. D. 19—.

D M, Clerk C. C. P., ——— county.

Entry—Name corrected, on plea in abatement.

(Title.) Indictment for ———.

This cause being heard on the plea of the defendant, and the court being satisfied thereby that the true name of said defendant is E F, it is ordered that the correction be made; and that in all further proceedings under this indictment said defendant be designated by the name of E F.

After the above amendment, the title of the case will be:

The State of Ohio
v.
E F,
} who is indicted by the name of
C D.

Sec. 13627. Prosecuting attorney may demur or reply to a plea in abatement.

The prosecuting attorney may demur to a plea in abatement, if it is not sufficient in substance, or he may reply, setting forth any facts which may show there is no defect in the record as charged in the plea. (R. S. § 7255; 66 v. 304, § 113.)

The issue of fact on a plea in abatement must be tried by a jury. Chitty's Criminal Law, 450; Wharton on Criminal Law, § 537; Bishop on Criminal Procedure, §§ 752-756. See the language of the court in State v. Easter, 30 O. S. 548: "If taken at the proper time, the question whether the juror (grand juror) was

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indifferent or not would have been tried by the triers; but if taken in the form of a plea in abatement, the established mode of trial will be changed for that of a jury of twelve men."

It is not correct practice to plead specially to an indictment a matter which is competent and proper by way of defense under the plea of not guilty; but if the State demur generally, or take issue on any such special plea, the irregularity is thereby waived. Hirn v. State, 1 O. S. 15.

A plea in abatement to an indictment alleging that the grand jury which returned the indictment did not have before it or within the knowledge of its members any evidence connecting the defendant with the crime alleged, does not set up a defect in the record by facts extrinsic thereto, and a demurrer to such a plea must therefore be sustained. State v. Schroder, 16 N. P. (N.S.) 265.

Sec. 13628. After demurrer accused may plead.

After demurrer to an indictment is overruled, the accused may plead "not guilty," or in bar. (R. S. § 7256; 66 v. 304, § 114.)

If a special plea to an indictment be determined to be insufficient, the judgment of the court should be respondeat ouster; as in this state the court could not proceed to final judgment in a criminal case without a plea of guilty or a finding by a jury. Hirn v. State, 1 O. S. 15.

A person indicted for a misdemeanor, upon request in writing subscribed by him and entered on the journal, may be tried by the court; § 13676.

Upon the trial of an issue raised by a plea of not guilty, in the higher grades of crime, it is not in the power of the accused to waive a trial by jury, and, by consent, submit to have the facts found by the court, so as to authorize a legal judgment and sentence upon such finding. Williams v. State, 12 O. S. 622.

Cited, Moore v. State, 13 C. C. 12, 7 O. C. D. 70.

ARRAIGNMENT.

Sec. 13629. Arraignment of accused.

The accused shall be arraigned by the clerk of the court, or his deputy, reading the indictment to him, unless the accused or his attorney waive the reading thereof, and he shall then be asked by the court whether he is guilty or not guilty of the offense charged. (R. S. § 7257; 83 v. 76; 68 v. 3, § 1.)

Although the record of a prosecution for crime shows that the defendant waived arraignment, the judgment, upon conviction, will not be reversed, if it further discloses proceedings constituting an arraignment. Where the defendant in such prosecution, after he was furnished with a copy of the indictment as required by statute, came with the prosecuting attorney and his own counsel before the court and personally waiving arraignment, entered such waiver and his plea of not guilty in writing with his own hand on the indictment, held, that these proceedings constituted, in substance, an arraignment. Goodin v. State, 16 O. S. 344.

The record of conviction for crime must show that the defendant was arraigned on the indictment. Hanson v. State, 43 O. S. 376.

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The provision of § 13581, as to defects in an indictment which shall not be regarded as fatal, does not apply to the case of one who has been convicted of an infamous crime without having been arraigned on the indictment or having entered a plea thereto, and such an omission constitutes reversible error. Emmons v. State, 14 C. C. (N.S.) 351, 23 O. C. D. 516.

The defendant's attorney may waive the reading of the indictment. Schlagel v. State, 3 N. P. (N.S.) 429, 16 O. D. 295.

Sec. 13630. Pleas in bar.

The accused may then offer a plea in bar to the indictment that he has before had judgment of acquittal, or has been convicted or pardoned for the same offense. To this plea the prosecuting attorney may reply that there is no record of such acquittal or conviction, or that there has been no pardon. The issue thus made shall be tried to a jury, and on such trial the accused must produce the record of such conviction or acquittal, or such pardon, and prove that he is the person charged in such record or mentioned in such pardon. He may adduce such other evidence as is necessary to establish the identity of such offense. (R. S. § 7258; 66 v. 304, § 116.)

By G. C. § 13631 a plea in bar must be in writing, signed by accused, and sworn to before a competent officer.

For cases in which an improper discharge of the jury is held to be equivalent to an acquittal, see G. C. § 13689.

Where a motion in arrest of judgment is sustained after a conviction the accused may be again indicted and tried. See G. C. § 13750.

Plea in bar—Form of.—A plea of autrefois acquit must set forth not only the verdict of the jury in the former trial, but a judgment thereon, or it is bad. Hurley v. State, 6 O. 400.

A plea of former conviction, which is insufficient in matter of substance, does not raise an issue for a jury, but may be adjudged insufficient on demurrer. Gormley v. State, 37 O. S. 120.

A demurrer to a plea in bar to an indictment should be sustained where it appears from the plea that the offense charged in the indictment and the offense of which the defendant claims to have theretofore been acquitted, convicted or pardoned is not the same offense. Griffith v. State, 93 O. S. 294.

Judgment of acquittal or conviction.—A nolle prosequi entered, without the consent of the prisoner, after the jury is impaneled and sworn, is equivalent to a verdict of acquittal. Mount v. State, 14 O. 295.

After a verdict of guilty, and judgment reversed on account of error in the proceedings, the prisoner is not protected from a second trial before a jury, by the provision in the bill of rights that "the accused shall not be twice put in jeopardy for the same offense." Sutcliffe v. State, 18 O. 469.

On a plea of autrefois acquit, the true test to determine whether the accused has been put in jeopardy for the same offense is, whether the facts alleged in the second indictment, if proven to be true, would have warranted a conviction on the first indictment. Price v. State, 19 O. 423; Methard v. State, 19 O. S. 363.

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The plaintiff in error, defendant below, was put on trial for a penitentiary offense. After a jury had been impaneled and sworn, a juror arose in open court, and stated that he had been one of the grand jurors by whom the indictment had been found. Pertinent inquiries had been openly made upon this subject by counsel for the state, before the jury was sworn, to which the juror had failed to respond. The defendant's counsel, thereupon, in answer to an inquiry by the court, objected to proceeding in the trial with the jury then impaneled, at the same time declining to waive any of the defendant's rights. The jury was thereupon discharged by the court, and another jury impaneled in the usual mode, and the trial proceeded, the defendant objecting thereto. Held, that the discharge of the jury first impaneled was the necessary result of sustaining the objection interposed by the defendant himself, and so did not take place without his consent, but was an act done at his own instance, and would not, therefore, operate as an acquittal, nor bar a further prosecution. Stewart v. State, 15 O. S. 155.

In a criminal cause, the discharge of the jury without the consent of the defendant, after it has been duly impaneled and sworn, but before verdict, is equivalent to a verdict of acquittal, unless the discharge was ordered in consequence of such necessity as the law regards as imperative. In such case, the record must show the existence of the necessity which required the discharge of the jury; otherwise, the defendant will be exonerated from the liability of further answering to the indictment. Hines v. State, 24 O. S. 134; Dobbins v. State, 14 O. S. 493; Poage v. State, 3 O. S. 229; Mitchell v. State, 42 O. S. 383.

The rule is that the accused is once in jeopardy, when the plea of not guilty is interposed to a valid indictment, and the jury is sworn. Mitchell v. State, 42 O. S. 383.

A former conviction before a mayor for the violation of an ordinance is not a bar to the prosecution of an information charging the same act as a violation of a statute. Koch v. State, 53 O. S. 433.

The trial of a plea in bar to an indictment is not a trial of the cause within the meaning of § 7278, Rev. Stats. (G. C. § 13653), providing for what causes jurors may be challenged. Hence, the fact that a juror has also served as such upon the trial of a plea in bar to an indictment is not a ground for challenge upon the trial of the accused under such indictment. Carano v. State, 3 C. C. (N.S.) 629, 14 O. C. D. 93 (affirmed, 69 O. S. 561).

A judgment on the verdict of conviction or acquittal is not necessary in order that either may constitute a bar to another indictment for the same crime. Mount v. State, 14 O. 295.

The power of the court to discharge a jury for inability to agree, against the consent of the defendant, only exists in cases of absolute necessity, and when the jury have considered the case for such a length of time as to leave no reasonable expectation that they will be able to agree upon a verdict. Dobbins v. State, 14 O. S. 493.

A jury, charged with the trial of a capital case, after long deliberation unable to agree upon a verdict, may be discharged by the court, and the accused held to a further trial, without any infringement of the constitutional provision, that he shall not "be twice put in jeopardy for the same offense." Dobbins v. State, 14 O. S. 493.

The power exercised by the court may be reviewed on error. Dobbins v. State, 14 O. S. 493.

A jury may be discharged against the consent of the prisoner where he has been guilty of fraud in respect to the conduct of the trial, or where there is urgent

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essity for the discharge, such as death or serious illness of judge or juror, the ious illness of the prisoner, the ending of the term before verdict, or inability of jury to agree. Mitchell v. State, 42 O. S. 383.

The jury may be discharged without prejudice to the prosecution where there collusion between the prosecuting attorney and the accused, or where the accused been guilty of fraudulent practices in regard to the jury. State v. Hoffman, Dec. Rep. 128, 5 Bull. 875.

When the defendant is discharged under this section or under G. C. § 13686, order of discharge is to be regarded, not as a mere temporary release of the soner from confinement, but as a final judgment in the cause, and a bar to all sequent prosecutions for the same crime or offense. Ex parte McGehan, 22 O. S.

One who has been tried upon an indictment and acquitted can not be again d for the same offense although his acquittal resulted from erroneous decisions n the trial. State v. Budd, 65 O. S. 1.

An accused is not in jeopardy by reason of a proceeding in a court which has jurisdiction of the subject-matter. State v. Rose, 89 O. S. 383.

Where the accused has engaged with another in a criminal conspiracy or n having for its purpose the larceny of specific automobiles belonging to separate ners, and in pursuance of such plan the confederate steals such automobiles at ers times and places, each theft constitutes a distinct and separate offense, an acquittal of one does not place him twice in jeopardy on the trial of the er. Patterson v. State, 96 O. S. 90.

Where evidence relating to the larceny of C's car committed in pursuance of h criminal plan is offered by the state, such evidence is competent. And where accused objected to such evidence solely because he had been tried and acquitted such larceny but made no objection otherwise and made no request that the e should be limited to the purpose of proving such plan, he can not in a rt of error complain that the trial court erred in not limiting such evidence the purpose stated. Patterson v. State, 96 O. S. 90.

A person arrested upon a warrant charging him with embezzling seventy-seven lars, a felony for which he was discharged in the municipal court, can not set this discharge as a plea in bar to an indictment in the common pleas court rging him with embezzlement of the same seventy-seven dollars, for the reason t the municipal court did not have jurisdiction of the felony charge, its powers g limited to that of an examining magistrate. State v. Stiver, 17 N. P. (N.S.)

In a criminal prosecution, a plea of a former conviction or acquittal for the e offense, presents an issue of fact, and the record of such former conviction or uittal, is competent evidence in support of such plea. Where such plea is ten- ed by a motion, to which is attached the transcript of a former conviction or uittal, the act of attaching such transcript is not the offering of the same in dence.

The judgment of a mayor upon an issue presented by a plea in bar may, under authority of § 6565 (G. C. §§ 10359 to 10363), be reviewed independently of the er issues in the case, where presented upon a bill of exceptions containing the dence upon this issue alone. Whitman v. State, 7 C. C. (N.S.) 334, 17 O. C. D.

One acquitted under an indictment for stealing certain property may be sequently indicted and tried for receiving and concealing the same property, wing it to have been stolen. Beamer v. State, 10 C. C. (N.S.) 131, 19 O. C. D.

Where the owner of several teams, engaged with different drivers on the same rk, is prosecuted and convicted of cruelty to a mule that was being worked with e shoulders, such conviction can not be set up as a plea in bar to a second prose- ion for cruelty on the same day to another mule, which was working in another m and with a different driver. Wood v. State, 10 C. C. (N.S.) 371, 20 O. C. D.

Where, on the trial of a defendant, on an indictment charging him with rder in the first degree, the jury returned a verdict, finding him not guilty of rder in the first or second degree, but guilty of manslaughter only, and a gment was entered upon such verdict, which was afterwards, on proceedings in or, instituted by the defendant, reversed for errors occurring at the trial, and

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the case was remanded to the trial court for further proceedings therein, it was not error for such court to try the defendant on the charge made in the indictment, and if the evidence warranted it, the defendant might properly be convicted of murder in the first or second degree, of which by the former finding of the jury he had been acquitted. Hurley v. State, 4 C. C. 425, 2 O. C. D. 630.

Where a defendant on his trial on an indictment charging him with the crime of larceny has been found guilty by the jury and sentenced by the court, and has prosecuted a proceeding in error to reverse such judgment, and the record shows that on a former trial of the defendant on the same indictment, at a previous term of the court, a jury was duly impaneled and sworn, and the evidence and arguments of counsel heard and the charge of the court given, and that the jury had retired to consider of their verdict, and on the same day an entry was placed upon the journal of the court reciting that "afterwards came the said jury into open court and state that they are unable to agree upon a verdict, whereupon they are by the court discharged from further consideration of this case, and the said case is passed." Held: That no sufficient or any reason being shown for the discharge of such jury, and it not appearing that it was with the consent of the defendant, or that the question of the necessity for the discharge of the jury had engaged the attention of the court, or that such order was the result of consideration that, on the record as it stood, the discharge of the jury operated as a discharge of the defendant from further prosecution on such indictment.

That the defendant can avail himself of such action of the court in a proceeding brought to reverse the judgment rendered against him on a subsequent trial on said indictment, though prior thereto he had not filed a plea in bar, under § 7258, Revised Statutes, setting up such former acquittal. This was not essential, as all of the facts as to this appeared upon the record. Ladd v. State, 5 C. C. 276, 3 O. C. D. 137.

A release on habeas corpus by the supreme court, because the relator had not been extradited for the offense for which he was to be tried, is not a bar to a second prosecution. Ex parte McKnight, 3 N. P. 255, 4 O. D. 284.

A release by the probate court on habeas corpus proceedings because he had remained in jail more than two terms does not prevent a second prosecution. Ex parte McKnight, 3 N. P. 255, 4 O. D. 284.

Plea of former jeopardy is properly heard and determined by a mayor under G. C. § 4528, in a prosecution for unlawfully keeping a place for sale of intoxicating liquors contrary to G. C. § 13195, and, since the prosecution is for a fine only, a jury trial is not necessary. Sanders v. State, 1 O. A. R. 306, 20 C. C. (N.S.) 395, 24 O. C. D. 226.

This section applies to criminal proceedings upon indictment. G. C. §§ 10490 and 10491 do not make the procedure of this section applicable to procedure before a mayor or a justice of the peace. Sanders v. State, 1 O. A. R. 306, 20 C. C. (N.S.) 395, 24 O. C. D. 226.

Nolle prosequi.—Where, after the jury was sworn on said second trial, a nolle prosequi was entered by the prosecuting attorney as to so much of said indictment as charged that the homicide was committed "with deliberate and premeditated malice," this did not operate to discharge the defendant from further prosecution for any other crime properly charged therein, as of murder in the second degree or manslaughter. Hurley v. State, 4 C. C. 425, 2 O. C. D. 630.

The crime of embezzling or misapplying bank funds is not inherently a joint offense, but it is a joint and several offense. It may be committed by one person

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number of persons; and accordingly the fact that the prosecuting attorney tered a nolle prosequi as to one of the defendants is not ground for dis- g the prosecution as to the other. State v. Keith, 91 O. S. 132 (dis- ning Stephens v. State, 14 O. 386).

ter the jury is impaneled and sworn, if a nolle prosequi be entered by the ting attorney, with leave of the court, and without the consent of the r, it is a good bar to another indictment for the same crime. Mount v. 14 O. S. 295.

ere one of several counts is abandoned by the prosecutor, if a nolle is not , and the jury disagree, the abandoned count is still good on a retrial. e v. State, 3 C. C. 551, 2 O. C. D. 318.

me offense.—Where an indictment for murder in the second degree was d against defendant, to which he pleaded not guilty and on which he was ed and sentenced. Held, that on error to reverse the sentence, no notice can n of the action of the court on a former indictment for the same homicide. cord of the proceedings upon the former indictment forms no part of the of the proceedings on the indictment on which the defendant was convicted. . State, 20 O. S. 460.

a plea of auterfois acquit, the true test to determine whether the accused n put in jeopardy for the same offense, is whether the facts alleged in the indictment, if proved to be true, would have warranted a conviction on the dictment. Price v. State, 19 O. 423.

e fact that a party has been indicted, tried, and acquitted in one county, harge of burglary and larceny committed therein, is not a bar to an indict- gainst the same party, in another county, charging a burglary in the latter Methard v. State, 19 O. S. 363.

conviction of acquittal on indictment for a single offense is a bar as to e offense; and when pleaded in bar to a subsequent indictment, on the that the offense in both indictments is the same, the identity of the offense e proved by the defendant, and it may be shown in parol evidence. The ion of the record, with proof showing that the same evidence which is ry to support the second indictment, would have been admissible and suffi- o procure a legal conviction upon the first, will generally make a prima se on the part of the defendant, which the state may meet by proof that nse charged in the second indictment was not the same as that charged in t. Where, upon a trial under an indictment containing but a single charge, te has offered evidence tending to prove several distinct offenses, upon of which a conviction might be had, it is the duty of the court, on motion defendant, to require the prosecutor, before the defendant is put on his to elect upon what particular transaction he will rely for a conviction. a former conviction or acquittal has been pleaded, though the offense charged second indictment might have been proved and a conviction had under the e state may prove that on the former trial it elected what transaction it ely upon for a conviction in that case, and that such transaction was different at elected and solely relied upon for conviction in the second case. Where ord of the former trial is silent in regard to such election, proof that the was made does not contradict the record, and may be made by parol. Bain- v. State, 30 O. S. 264.

conviction for keeping a place where intoxicating liquors are sold in viola- law between designated days in 1879, and a judgment that such place is a

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common nuisance, constitute no bar to an indictment for keeping such place between designated days in 1880, although the order under the first conviction, that the defendant should shut up and abate the nuisance, was not obeyed or enforced. Gormley v. State, 37 O. S. 120.

In the absence of consent to or urgent necessity for the discharge of a jury in a criminal case, if it appear that in fact the same identical act has been charged successively in two valid indictments, upon one of which the accused has been in jeopardy by a trial, and that the evidence necessary to support the second indictment would have been sufficient to prove a legal conviction upon the first, the plea of former jeopardy to the last indictment will be sustained, and ordinarily, otherwise not. Mitchell v. State, 42 O. S. 383.

In this state, neither the common law in relation to crimes, nor the common law distinction between felonies and misdemeanors, nor the doctrine of merger in criminal cases, has at any time existed; the accused may be found guilty of the principal offense charged in this indictment, or acquitted thereof and found guilty of any offense in terms or by necessary implication charged in the indictment; the constitutional inhibition against a second trial for the same offense embraces all criminal prosecutions. Mitchell v. State, 42 O. S. 383.

Upon the trial of A, upon indictment under Rev. Stats. § 6820, in which it is charged that he did shoot B, with intent to kill him, when the evidence shows that A did unlawfully shoot at B, with such intent, at the time and place and with a loaded weapon as charged, but that the bullet failed to touch B's person, A may be found guilty of an assault, and punished by fine and imprisonment, under Rev. Stats. § 6823; and where in such case, the court, assuming to act under Rev. Stats. § 7303, discharges the jury after the evidence is heard, against the objection of the accused, with the view to a prosecution against him for shooting at B, with intent to kill him, such discharge is a virtual acquittal of A, as to all the matters charged in the indictment. Mitchell v. State, 42 O. S. 383.

An acquittal or conviction for a minor offense included in a greater will not bar a prosecution for the greater if the court in which the acquittal or conviction was had was without jurisdiction to try the accused for the greater offense. Crowley v. State, 94 O. S. 88.

Where a person has been in jeopardy on the charge of assault and battery upon an affidavit filed with the mayor of a city, the plea of such jeopardy is insufficient as a bar to a prosecution by indictment for assault with intent to commit rape, although the facts alleged in the indictment if proven to be true would have warranted a conviction on the charge made in the affidavit. Crowley v. State, 94 O. S. 88.

Where a verdict of not guilty has been directed on the application of the defendant, on the ground that the indictment was fatally defective, he can not thereafter plead former jeopardy when reindicted for the same offense. Sigourney v. State, 6 O. A. R. 156.

It may be stated as a general rule that where an indictment is quashed at the instance of the defendant, though after jeopardy has attached, he can not thereafter plead former jeopardy when placed on trial on another indictment for the same offense. Sigourney v. State, 6 O. A. R. 158.

A conviction for keeping a saloon open on Sunday in violation of a city ordinance, is not a bar to a subsequent prosecution charging the same act as a violation of a statute. Koch v. State, 8 C. C. 641, 4 O. C. D. 209 (affirmed, 53 O. S. 433).

One acquitted under an indictment for stealing certain property may be subsequently indicted and tried for receiving and concealing the same property, knowing it to have been stolen. Beamer v. State, 10 C. C. (N.S.) 131, 19 O. C. D. 578.

An acquittal under an indictment charging the theft of property belonging to John W. E———, is not a bar to a prosecution under another indictment charging the theft of property belonging to Joseph W. E———. Horner v. State, 8 C. C. (N.S.) 441, 18 O. C. D. 568.

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equittal on charge of burning a dwelling house is not a bar to a prosecution rning a structure other than a dwelling. Van Immons v. State, 12 C. C. 417, 19 O. C. D. 681 (affirmed, 72 O. S. 678).

here the owner of several teams, engaged with different drivers on the same is prosecuted and convicted of cruelty to a mule that was being worked ore shoulders, such conviction can not be set up as a plea in bar to a second ution for cruelty on the same day to another mule, which was working in r team and with a different driver. Wood v. State, 10 C. C. (N.S.) 371, 20 D. 255.

conviction for assault and battery is not a bar to a subsequent prosecution nslaughter where the assaulted person dies after the first conviction. State s, 2 N. P. 368, 4 O. D. 5.

acquittal of illegal voting under G. C. § 13254 is not a bar to a subsequent ution for falsely and fraudulently obtaining registration at the same election G. C. § 13296. In re Donahue, 4 N. P. 296, 6 O. D. 389.

the evidence to support a conviction in the first case would not be the s that required to support a conviction in the second case, a plea in bar will sustained. Weaver v. Mt. Vernon, 7 N. P. 374, 6 O. D. 436.

person can not be convicted under separate sections of a statute or ordinance same act. Weaver v. Mt. Vernon, 7 N. P. 374, 6 O. D. 436.

vidence.—The plea of former conviction or acquittal can not be sustained ol testimony; the record of conviction or acquittal must be produced. Robins d, 2 O. 76.

plea of auterfois acquit must set forth not only the verdict of the jury former trial, but a judgment thereon, or it is bad. Hurley v. State, 6 O. 399.

e production of the record together with proof of the identical offense a prima facie case on the part of the defendant. Bainbridge v. State, 30 264.

here a former conviction or acquittal has been pleaded, though the offense l in the second indictment might have been proved and a conviction had he first, the state may prove that on the former trial it elected a transaction was different from that elected and solely relied upon for a conviction in ond case. Bainbridge v. State, 30 O. S. 264.

plea of former conviction, which is insufficient in matter of substance, does ise an issue for a jury, but may be adjudged insufficient on demurrer. y v. State, 37 O. S. 120.

the trial of an accused upon on indictment charging the obtaining of money false pretenses it is error to exclude evidence tending to prove that the int had theretofore been convicted of embezzlement of the same money or y that is alleged in the indictment to have been procured by false pretenses. cord of the former indictment and proceedings had thereunder is competent e tending to show a former conviction of embezzlement of the same funds; ition thereto the defendant must show by further evidence that he is the person named in the former indictment, that the transaction is the same e funds identical. Griffith v. State, 93 O. S. 294.

separate count charging each crime may be contained in one indictment, on the trial of such indictment the court should instruct the jury that the l can not be found guilty of both crimes in reference to the same money or y. The rule is the same where these crimes are charged in separate indict- and if it appears from the evidence that the state has theretofore procured ion for the embezzlement of money, the accused can not be found guilty second indictment of obtaining the same money by false pretenses. Griffith e, 93 O. S. 294.

hen a plea in bar is offered in a criminal case, it must be supported by the of the former conviction or acquittal for the same offense, and the accused lso prove tnat he is the same person who stood charged on the record. This ment is not met by the mere attaching of the transcript to the plea, and the ing of the plea under such circumstances is not error. Whitman v. State, (N.S.) 134, 17 O. C. D. 735.

plea in bar to a criminal charge does not present an issue solely for the jury, plea may be examined by the court as to its sufficiency, and if it be found

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that it is insufficient as a matter of law it may be adjudged so, and the jury discharged without prejudice to a further prosecution for the same offense.

A plea in bar which merely sets forth that the defendant has been previously put upon trial on an accusation of the same offense, and does not set forth the indictment on which he was tried, or even allege that it was a valid indictment, is insufficient in law and presents no issue for the jury. Horner v. State, 8 C. C. (N.S.) 441, 18 O. C. D. 568.

A plea in bar must be supported by the record of the former conviction or acquittal for the same offense, and the accused must also prove that he is the same person who stood charged in the record. This requirement is not met by merely attaching the transcript to the plea. Whitman v. State, 6 C. C. (N.S.) 134, 7 C. C. (N.S.) 334, 17 O. C. D. 735.

When an accused has been tried for abortion charged in two counts and found guilty upon one and not guilty upon the other, upon his second trial after reversal of the first judgment, it is not error to admit evidence as to his guilt under the charge as to which he was found not guilty at the first trial. Geer v. State, 16 C. C. (N.S.) 151.

Plea of former conviction.

State of Ohio
v.
E F.
} Indictment for ———.

The said E F in his own proper person comes into court here, and having heard the said indictment read, says that the said state of Ohio ought not further to prosecute the said indictment against him, the said E F, because he says, that heretofore, to-wit, at a term of the court of common pleas holden at ———, in and for the county of ———, in the State of Ohio, of the term of May, in the year of our Lord one thousand nine hundred and ———, it was by the jurors of the grand jury of the State of Ohio, impaneled and sworn to inquire of crimes and offenses in and for said county of ———, upon their oaths presented that (here recite the former indictment, the plea, trial, verdict, and judgment of the court); and the said E F says that he, the said E F, and the said E F so indicted and convicted as last aforesaid are one and the same person; and that the (name of the crime or offense) set forth and charged in the indictment last aforesaid, is the same (name of the offense) as is charged in the above-named indictment against him. And of this the said E F is ready to verify, and prays that by the court here he may be dismissed and discharged from the said premises, in the present indictment specified. E F.

The State of Ohio, ——— county, ss.

The above -named E F, defendant, being duly sworn according to law, deposes and says, all the statements and averments of the foregoing plea are true. E. F.

Sworn to and subscribed before me, this ——— day of ———, A. D. 19—.

D N, Clerk C. C. P., ——— Co., O.

Replication to the above plea of former conviction.

The State of Ohio
v.
E F.
} Indictment for ———.

And now comes P W, the prosecuting attorney, and says that the State of Ohio ought not to be barred from further prosecuting said indictment by reason of anything in the defendant's plea alleged, because he says there is no record of any conviction of the said defendant, for the offense in said indictment charged, and this the said P W prays may be inquired of by the country.

P W, Pros. Att'y of ——— county.

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Entry on the verdict of a plea in bar.

(Title.) Indictment for ———.

This day came the prosecuting attorney, on behalf of the state of Ohio, and the said defendant E F being brought into court in the custody of the sheriff, and arraigned upon said indictment for plea thereto offered his plea in bar. The prosecuting attorney filed his reply to said plea in bar, and hearing was had upon the issues presented by the same. A jury, to-wit: (name them), was duly impaneled and sworn according to law, and having heard the testimony, the argument of counsel, and the charge of the court, returned their verdict in writing, signed by their foreman, as follows: "We, the jury, being duly impaneled and sworn, do find on the issue joined in this cause, in favor of (or, against) the defendant.

N M, Foreman."

*Thereupon it is ordered and adjudged that the said defendant be discharged.

(If the jury find against the defendant after the * add the following:) Thereupon the said defendant E F being asked by the court whether he is guilty or not guilty of the offense charged against him in the indictment, says, that he is guilty.

Sec. 13631. Plea in bar or abatement to be in writing.

A plea in bar or abatement shall not be received by the court unless it is in writing, signed by the accused, and sworn to before a competent officer. (R. S. § 7259; 66 v. 305, § 117.)

Sec. 13632. Proceedings after verdict on the issue.

If the issue on the plea in bar is found for the accused, he shall be discharged; if it is found against him, or, if he offer upon arraignment no plea in bar, he shall plead "guilty" or "not guilty," but if he plead evasively or stand mute, he shall be taken to have pleaded "not guilty." (R. S. § 7260; 68 v. 4, § 118.)

In the police court of Cincinnati, the defendant having filed a plea setting forth matter of defense merely, it was not error in the judge, without passing upon this plea, to direct a plea of not guilty to be filed, the accused standing mute, and to proceed with the trial, when the evidence heard under the plea of not guilty could have had no other or different result, if based under the plea which defendant did file. Billigheimer v. State, 32 O. S. 435.

The tender of a plea of guilty of assault and battery by the accused upon arraignment under an indictment charging shooting with intent to wound and shooting with intent to kill, which tender is rejected by the state, is not a proper subject of record on the journal of the court. An entry on the journal reciting the tender of such a plea and its rejection by the state is inadmissible in evidence upon the trial of the accused under the indictment. Canter v. State, 90 O. S. 1.

On the trial of a plea in bar when the jury find in favor of a defendant he shall be discharged. State v. Thatcher, 12 O. D. 718.

Sec. 13633. Proceedings on plea of guilty.

If the accused plead "guilty," such plea shall be entered on the indictment, and he shall be placed in the custody of the sheriff until sentence. (R. S. § 7261; 66 v. 305, § 119.)

The refusal of the court to allow the defendant to withdraw his plea of guilty, and enter a plea of not guilty, rested in the sound discretion of the court. Lee v. State, 32 O. S. 113, 116.

See, Hirn v. State, 1 O. S. 15, 23; Carper v. State, 27 O. S. 572.

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Entry—Plea of guilty, and prisoner remanded.

(Title.) Indictment for ———.

Now comes the prosecuting attorney, on behalf of the State of Ohio, and the defendant being brought into court in custody of the sheriff, and arraigned upon said indictment, for plea thereto, saith he is "guilty," * and is remanded to the custody of the sheriff until sentence.

Entry—Plea of guilty, and sentence.

(Title.) Indictment for ———.

(As in last to *, and continue:)—thereupon (after hearing testimony, and being fully advised in the premises) it is ordered and adjudged by the court that the said E F (sentence as in one of the forms, *post*, § 13696).

Entry—Plea of guilty of smaller offense.

(Title.) Indictment for stabbing.

(As in first form to *, and continue:)—of assault and battery; which plea is accepted by the prosecuting attorney, and the said E F is remanded to the custody of the sheriff until sentence.

Entry—Plea of not guilty retracted, entered plea of guilty.

(Title.) Indictment for ———.

Now comes the prosecuting attorney on behalf of the State of Ohio, the defendant was brought into court in custody of the sheriff; thereupon said defendant retracts his plea of not guilty heretofore entered, and for plea to said indictment, saith he is guilty of assault and battery, which plea is accepted by the prosecuting attorney; and the said defendant is remanded to the custody of the sheriff until sentence. (Or sentence may be pronounced.)

Sec. 13634. Proceedings on plea of not guilty.

If the accused plead "not guilty," such plea shall be entered on the indictment, and the prosecuting attorney, under the direction of the court, shall designate a day for trial, which shall be of the term at which such plea is made, unless such court, for good reasons, continue the case to a subsequent term. (R. S. § 7262; 79 v. 112; 66 v. 305, § 120.)

Where the proper officer has neglected to enter upon the indictment the plea of not guilty by the accused, at the proper time, the court may, after he is ready for trial, and the jury has, without objection, been duly impaneled and sworn to try the case on such a plea, cure such omission by causing such plea to be so entered. Waggoner v. State, 30 O. S. 575.

The plea of not guilty upon the record, is not reached by the judgment of reversal. Though the plea remain upon the record, it is not error to inquire by a jury whether the prisoner stands mute obstinately, and to cause the plea of not guilty to be entered without his consent. Sutcliff v. State, 18 O. 469.

The refusal of the court to allow the defendant to withdraw his plea of guilty and enter a plea of not guilty rests in the sound discretion of the court. Lee v. State, 32 O. S. 113.

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A plea of not guilty was entered on an indictment, and subsequently leave was granted to withdraw the plea "for no other purpose than to enable the defendant to plead a former conviction." No order was made to strike the plea from the indictment, and the plea remained thereon. The plea of former conviction not having been sustained, the defendant was placed on trial without further plea and convicted. Held, that such withdrawal of the former plea was not absolute, and when the plea of former conviction was disposed of, it was not error to try the case on such plea of not guilty. Gormley v. State, 37 O. S. 120.

The plea of not guilty in a criminal case puts in issue all facts material to be proven by the state, as well as those relating wholly to the corpus delicti as those relating to the connection of the accused with the offense. The issue thus made is to be tried by the jury, and not by the court, and where the defendant has not, by his testimony or otherwise, admitted the claim of the state, as to the body of the crime, it is error for the court to recite to the jury the substance of the state's evidence, giving the details of the circumstances surrounding the commission of the alleged offense, and instruct them that those facts are shown by the uncontradicted evidence in the case. Mogan v. State, 48 O. S. 371.

The phrase corpus delicti, as used in criminal law, means the substance of the crime; and on a trial under an indictment for murder, proof of the manner and means in and by which the crime was consummated, does not relate to the corpus delicti, but is proof relating solely and directly to the accused's guilty agency in the crime. State v. Knapp, 70 O. S. 380.

A plea of not guilty upon the record is not reached by a judgment of reversal. Sutcliffe v. State, 18 O. 469.

The provision of G. C. § 13581, as to defects in an indictment which shall not be regarded as fatal, does not apply to the case of one who has been convicted of an infamous crime without having been arraigned on the indictment or having entered a plea thereto, and such an omission constitutes reversible error. Emmons v. State, 14 C. C. (N.S.) 351, 23 O. C. D. 516.

Where a defendant enters a plea of not guilty, he puts in issue all the material facts, including the corpus delicti, and a charge to the jury in such a case to the effect that the theft of the goods was not disputed or open to controversy is an invasion of the province of the jury and constitutes reversible error. Premack v. State, 11 C. C. (N.S.) 364, 20 O. C. D. 828.

A plea of self-defense admits the killing by the defendant but seeks to avoid the legal consequences by pleading and showing justification. If a defendant does not admit the killing, but stands on his plea of not guilty and challenges the state to prove beyond a reasonable doubt that the killing was committed by him, an instruction to the effect that there was some evidence that the killing was by the defendant, but he claimed he was justified under the doctrine of self-defense, is highly prejudicial since it leaves the jury no option but to find that the killing was the act of the defendant, their task being only to determine whether it was in self-defense; and such a charge shifts the burden of the proof and compels the defendant to prove his innocence by a preponderance of the evidence. Goings v. State, 24 C. C. (N.S.) 145.

Where a plea of not guilty is withdrawn for the purpose of demurrer or the filing of a motion, its withdrawal is not absolute, but merely suspends the effect of the plea until the questions which have been interposed have been determined, and a determination adverse to the claim of the defendant restores the plea and

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the issue which it raised between the state and the defendant, and it is not error in such case to proceed with the trial without the entering of a second plea. Andrews v. State, 15 C. C. (N.S.) 241, 23 O. C. D. 564 (motion for leave refused, 57 W. L. B. 520).

Entry—Plea of not guilty.

(Title.) Indictment for ———.

Now comes the prosecuting attorney on behalf of the State of Ohio, and the defendant being brought into court in custody of the sheriff, and arraigned upon said indictment, for plea thereto says he is "not guilty," and puts himself upon the country, and the prosecuting attorney doth the like.

(If counsel is then assigned, add:)—

And it appearing that said defendant is in indigent circumstances and unable to employ counsel, the court, at his request, assigns J W as counsel to defend him.

Entry plea of not guilty retracted and plea of guilty entered.

(Title.) Now comes the prosecuting attorney on behalf of the State of Ohio, and the defendant E F was brought into court in custody of the sheriff. Thereupon the said defendant retracts his plea of not guilty heretofore entered, and for plea to said indictment says he is guilty of (the crime of ——— as charged in the indictment or may plead guilty to a lesser offense, naming it in the entry, which plea is accepted by the prosecuting attorney, and the said defendant is remanded to the custody of the sheriff until sentenced (or if sentence is pronounced then add the form of sentence as found under § 13696).

Sec. 13635. Witness refusing to enter into recognizance committed to jail.

In case of felony, in the event of a continuance either before or after the accused is arraigned, the court may require any witness designated by the prosecuting attorney, to enter into a recognizance, in such sum as the court deems proper, for his appearance at a subsequent term of such court to which such cause may be continued, to testify in such cause. A witness failing or refusing to enter into such recognizance shall be committed to the county jail until he is called upon to testify in such cause. If a witness, committed to jail upon order of court for want of such recognizance, is pecuniarily unable to give the required bond, he shall be paid like fees while so committed as are allowed witnesses by law in state cases. (R. S. § 7262; 79 v. 112; 66 v. 205, § 120.)

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CHANGE OF VENUE.

13636. Venue is changed when an impartial trial can not be had.

riminal cases shall be tried in the county where the offense was
nitted. If it appear to the court thereof by affidavits that a fair
mpartial trial can not be had therein, such court shall order that
ccused be tried in an adjoining county. (R. S. § 7263; 99 v.
66 v. 305, § 121; S. & C. 1183.)

or venue in bribery, see G. C. § 12824.
or venue in forgery, see note under G. C. § 13083.
or defects as to venue that are not fatal, see note to G. C. § 13581.
oint indictment.—Where parties are jointly indicted, the court has power,
good cause shown, to order a change of venue as to either of the defendants,
his motion alone. Brown v. State, 18 O. S. 496.
enue.—When property is stolen in one county, and the thief is afterward
in another county with the stolen property in his possession, he may be
ed and convicted in either county, but not in both. Stanley v. State, 24
166.
here A steals a horse in Illinois and brings it into Ohio he may be prosecuted
or the larceny. Hamilton v. State, 11 O. 435.
here A steals silverware in Canada, or other foreign country, and brings it
hio he can not be prosecuted here for the larceny. Hamilton v. State, 11
, limited; Stanley v. State, 24 O. S. 166.
here A prescribes and furnishes poison in one county to B who carries it
nother county and there under the directions given takes it, the administering
summated and the crime committed in the county where B is poisoned.
rs v. State, 8 O. S. 131.
ne who sells impure and adulterated wine is subject to fine, although at the
f the sale he is the agent of a principal who resides without the state. Meyer
te, Bissman v. State, 54 O. S. 242.
he manager of a mercantile corporation is subject to a fine under the provi-
f the "act to provide against the adulteration of food and drugs," when the
rated article is sold or offered for sale by an agent of such corporation acting
the scope of his authority, and the offense is triable in the county in which
rticle is sold or offered for sale by such agent. Meyer v. State; Bissman v.
54 O. S. 242.
here A in another state forges an instrument which is uttered and published
o by B an innocent agent, A may be punished here. Lindsey v. State, 38
507.
here A, in X county, induces B, in Y county, by means of false pretenses
in a letter to ship goods to him (A), the delivery to the carrier is a de-
to A and the crime can not be prosecuted in X county. Norris v. State,
. 217.
the charge of uttering and publishing a forged instrument under G. C.
, the place where the instrument is uttered, and not where the forgery was
ted, determines the jurisdiction. Where A forges an instrument in another

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state which is uttered and published in Ohio by B, an innocent agent, A may be punished in this state. Lindsey v. State, 38 O. S. 507.

Where A caused a note to be filled out over a signature previously forged, a forgery is committed in the county where the blank was filled. Devere v. State, 5 C. C. 509, 3 O. C. D. 249 (affirmed, no report, 25 Bull. 435).

Where an indictment fails to allege that the offense charged was committed in the county where the indictment was found it is defective, and such defect is not cured by G. C. § 13581. Knight v. State, 54 O. S. 365.

In the prosecution of a criminal case, it is not essential that the venue of the crime be proven in express terms, provided it be established by all the facts and circumstances in the case, beyond a reasonable doubt, that the crime was committed in the county and state as alleged in the indictment. State v. Dickerson, 77 O. S. 34.

A trial judge will not set aside a verdict of guilty because of failure to establish venue, where the proof was to the effect that the offense charged was committed in the city in which the judge resides and has resided for many years, but failed to name the county and state. State v. Fritz, 11 N. P. (N.S.) 138.

In a criminal trial before a magistrate in the city of Cleveland, the venue is sufficiently established if the evidence makes it appear that the offense was committed in Bedford township in the state of Ohio and within ten miles of the "public square," when it is a matter of common knowledge that the city of Cleveland is located in Cuyahoga county and there is a Bedford township in that county which is within ten miles of the public square in the city of Cleveland. Ames v. State, 11 N. P. (N.S.) 385, 22 O. D. 92.

A prosecution against a county officer for soliciting a bribe outside of his county must be in the county where the bribe was solicited and not in the county where he holds office. State v. Knight, 54 O. S. 330.

General Code § 12659 providing that one polluting a stream may be prosecuted in any county into which such stream passes, authorizes the prosecution of a corporation in a county other than the one in which the unwholesome substance was introduced. Such section is not in conflict with this section, nor is it unconstitutional. American Strawboard Co. v. State, 70 O. S. 140.

Where A by letter solicits an order for whiskey in a dry county, the sale to be complete when the purchaser approves the goods, prosecution is properly begun in the county where the purchaser receives the letter. Hayner v. State, 83 O. S. 178.

On the trial of an indictment for embezzlement a request to charge the jury to inquire as to the county in which the accused formed the criminal intent, disconnected from acts designed to carry such intent into execution is properly refused. Gravatt v. State, 25 O. S. 162.

Embezzlement is committed in the county in which the defendant fails to account. Campbell v. State, 35 O. S. 70.

Where B, employed in L county to sell goods in S county and to account in L county, converts the proceeds of sales in S county to his own use and absconds, and mails a false account to his employers, he may be indicted and tried in L county where he is to account. Bailey v. State, 50 O. S. 636.

Where A embezzles stock in New York by pledging it, the sending it here by the innocent pledgee for transfer does not make the crime punishable in Ohio. State v. Ives, 20 Bull. 266 (affirmed, no report, 21 Bull. 363).

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prosecution for nonsupport of a parent under G. C. § 12429 must be instituted county in which the defendant resides at the time he neglects or refuses to h the support. State v. Dangler, 74 O. S. 49.

enue of the crime of failure to provide for minor children (G. C. § 13008) the county where the child is when the complaint is made, and a parent be guilty in such county although he is a resident of another state. State v. r, 81 O. S. 393.

nder G. C. § 13008 if the wife of A obtains a divorce from him while he is a nt of Portage county and she then moves to Medina county taking A's children with her under a decree of the court which awards her the custody e children, and A then remarries and moves to Summit county, he may be uted in Medina county for neglecting and refusing to provide for his minor en under sixteen years of age with proper home, care, food and clothing. v. State, 18 C. C. (N.S.) 482, 24 O. C. D. 487.

Where a woman is induced to submit to and does submit to a criminal opera- in one county and the resulting miscarriage occurs in an adjoining county, enue is properly laid in the county in which the inducement took place and peration was performed. Waite v. State, 4 O. A. R. 451, 23 C. C. (N.S.) 455 on for leave overruled, 13 O. L. R. 455).

Where the inducing, decoying, etc., of a female under eighteen years of age ter a house of ill-fame, punished by G. C. § 13027, is done in one county, but ouse of ill-fame is in another county, the venue is properly laid in the county the inducing, decoying, etc., was done. Studer v. State, 9 C. C. (N.S.) 185, C. D. 33 (affirmed, without report, 74 O. S. 519).

Where an island in an unnavigable stream forming the boundary line between ounties lies substantially south of what would be the middle thread of the stream, extending only eight or ten feet north thereof, and the channel south island is not more than half the width of that on the north, the boundary llows the thread of the northern channel, and the island lies in the southern y.

enue in a prosecution for illegal fishing on the northern shore of such an is properly laid in the southern county. Overly v. State, 8 C. C. (N.S.) 390.

he state of Ohio has criminal jurisdiction of offenses committed beyond low mark on the Ohio river, opposite the boundary of the state of Ohio. State v. s, 15 C. C. (N.S.) 65, 23 O. C. D. 224 (reversing 8 N. P. (N.S.) 228, 19 878).

t is a violation of G. C. § 13232 to sell intoxicating liquors, as a beverage, on t anchored in the Ohio river opposite the shore of a municipality of this with a passageway for persons to and from the bank of said river in said ipality to said boat, after a majority of the voters of the municipality had to prohibit the sale of intoxicating liquors therein. State v. Savors, 15 C. C.) 65, 23 O. C. D. 224 (reversing 8 N. P. (N.S.) 228, 19 O. D. 878).

ection four of the act passed March 12, 1909 (100 O. L. 89), (G. C. 13225), ed "An act to amend and supplement § 5 of an act entitled, 'An act providing st the evils resulting from the traffic in intoxicating liquors," passed May 14, as amended March 28, 1906, and to further provide against the evils result- rom the traffic in intoxicating liquors," which section makes it an offense to orders for intoxicating liquor in any county where the sale as a beverage is

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prohibited, is not violative of the constitution of the state and is a valid law. Hayner v. State, 83 O. S. 178.

Where a letter soliciting an order for the sale of liquor provides, as a condition of sale, that the person solicited, on receiving the liquor, has the option to accept or not, and to send the price named only in case he approves the goods and concludes to purchase, otherwise to return them at the sender's expense, such approval and conclusion to purchase are necessary to complete a sale. Therefore, the solicitation is for a sale to be completed in the county of the residence or business of the one solicited, and prosecution for violation of the act is properly conducted in such county. Hayner v. State, 83 O. S. 178.

The word "ship," as used in § 13216, General Code, means to deliver to a common carrier for transportation; and where intoxicating liquor is bought and paid for in one county, with instructions to the seller by the buyer to ship by express to him in another county, if it be shipped under a false or fictitious name or title, the offense under § 13216 is complete in the county where the liquor is bought and delivered to the express company, and the shipper must be prosecuted there. State v. Bayer, 93 O. S. 72.

If the defendant permits a court to assume jurisdiction on the theory that the act if committed at all was committed within the jurisdiction of the court, he can not be heard upon the question of venue in a reviewing court. Ames v. State, 11 N. P. (N.S.) 385, 22 O. D. 92.

To bring a prosecution under the Valentine anti-trust act within the venue of a particular county, the illegal combination must have been entered into in such county, or some act must have been committed therein, in furtherance of the unlawful purposes of such combination. Hughes v. State, 9 C. C. (N.S.) 369, 19 O. C. D. 237.

Change of venue.—In this state, the court of common pleas has no authority, by the common law, to order a change of venue in criminal cases; such power is conferred upon the court by statute. The statute relating to a change of venue in criminal cases confers upon the court of common pleas, in the county where the offense was committed, power to order a change of venue to an adjoining county, but the exercise of such power is confined to the jurisdiction of the county where the offense was committed. State v. McGehan, 27 O. S. 280.

The guaranty contained in § 10 of the Bill of Rights, that an accused person shall have a "trial by an impartial jury of the county or district in which the offense is alleged to have been committed," does not require that the trial shall take place within the judicial district where the indictment is found; and under § 7263, Revised Statutes, the court in which the indictment is returned may, on motion of the accused, if an impartial jury can not be had there, order that he be tried in any adjoining county. State, ex rel., v. McCarty, Judge, 52 O. S. 363.

Under authority of § 7263, Revised Statutes (G. C. § 13636), regulating the change of venue in criminal cases, the court having jurisdiction of the cause in the county of the offense, if it be made to appear to the court that a fair and impartial trial can not be had therein, may, upon application of the prosecuting attorney on behalf of the state, direct that the cause be tried in an adjoining county.

Said section, thus construed, is not repugnant to § 10 of Article I of the constitution of Ohio. State v. Durflinger, 73 O. S. 154.

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The state has an equal right with the defendant to a change of venue, when re is no restriction of the right to the defendant by the law providing for n change of venue. State v. Meyers, 21 W. L. B. 57. See discussion of this stion as to change of venue by the state in 20 W. L. B. 474.

It is said that an order granting a change of venue in a criminal case made n the application of the state before the accused knows that he has been cted, is absolutely void, and that another judge of the same court may ignore n entry and may set it aside. State v. Cox, 9 O. L. R. 19.

A court is without jurisdiction to grant a change of venue in a criminal case ept upon a finding based on positive proof of the impossibility of securing a trial in the county in which the offense was committed. State v. Cox, 9 O. L. 19.

Where parties are jointly indicted, the court has power, upon good cause wn, to order a change of venue as to either the defendants, upon his motion ne.

Such motion and order necessarily involve and include a motion and order a separate trial of the party making the motion, and have all the force and ct of a motion, and order for both purposes. Brown v. State, 18 O. S. 496.

The duties of a clerk of the court of common pleas are ministerial and non-icial, and in a proceeding in mandamus to compel him to obey an order of the rt of which he is clerk, allowing a change of venue in a cause pending in said rt, and directing him to transmit the papers and pleadings in said cause to the rt of common pleas of the county to which the place of trial of said cause has n changed, such clerk can not set up as a defense, and have adjudicated in such ndamus proceeding the invalidity of such order or the want of jurisdiction in court to make it. State, ex rel., v. Chapman, 67 O. S. 1.

A motion for a change of venue is addressed to the sound discretion of the rt, and can not be reviewed upon error unless there is a clear abuse of discre-. Hotelling v. State, 3 C. C. 630; 2 O. C. D. 366.

A trial judge is not without discretion in the matter of granting a change of ue in a criminal case upon the filing of affidavits that a fair trial can not be in the county, but he must determine from the affidavits whether a change of ue should be granted. Lingafelter v. State, 8 C. C. (N.S.) 537, 18 O. C. D. 800 irmed, 51 W. L. B. 377).

While the question of a change of venue in a criminal case is within the nd discretion of the trial court, it is nevertheless a substantial right of the ndant to be tried by a fair and impartial jury. Baxter v. State, 91 O. S. 167.

Where a defendant is charged by indictment with the embezzlement of funds n insolvent bank, and upon motion for a change of venue, it is made to appear the affidavit of the accused and the affidavit of ten credible persons residing in county in which the indictment is returned, that there are residing in that nty two hundred and fifty-seven stockholders, and more than five thousand ositors in the bank, the funds of which he is charged with embezzling, and that he opinion of the several persons making such affidavits, he can not have a fair impartial trial in that county, a change of venue should be ordered. Baxter State, 91 O. S. 167.

In applying this section, G. C. § 11416, which provides for a change of venue n one of the parties to a civil action is a corporation having more than fifty

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stockholders, and the action is brought in the county in which the corporation keeps its principal office and transacts its principal business, was regarded as furnishing an analogy for cases in which the refusal of a change of venue by the court in a criminal case would be regarded as an abuse of discretion. Baxter v. State, 91 O. S. 167.

If it appears from the evidence, offered in support of a motion for a change of venue, that it is improbable the defendant can secure a fair and impartial trial or an unbiased or unprejudiced jury in the county of his residence, it is the duty of the court to order a change of venue. State v. Elliott, 25 Bull. 366, doubted; State v. Dickerson, 7 N. P. (N.S.) 193, 19 O. D. 44 (affirmed, 77 O. S. 34).

The examination of jurors on their voir dire affords the best test as to whether or not prejudice exists in the community against the defendant; and where it appears that the opinions as to the guilt of the defendant of those called for examination for jurors are based on newspaper articles, and that the opinions so formed are not fixed but would yield readily to evidence, it is not error to overrule an application for a change of venue. Townsend v. State, 17 C. C. (N.S.) 380, 25 O. C. D. 408.

Whether there should be a change of venue in a criminal case is to be determined in the sound discretion of the court, to which application is made for such change. State v. Smith, 16 N. P. (N.S.) 535, 24 O. D. 476.

The best test whether a fair trial can be secured is the demonstration of that fact in the process of impaneling a jury, and if it thus appears, the defendant should then have the privilege of renewing his motion for a change of venue, where the former application has been overruled. State v. Smith, 16 N. P. (N.S.) 535, 24 O. D. 476.

An affidavit of prejudice filed on the day of trial and immediately before its start, is too late and may be disregarded by the trial judge. Lieblang v. State, 21 C. C. (N.S.) 539, 18 C. C. (N.S.) 179.

Entry on motion for change of venue.

(Title.) Indictment for ———.

This day this cause came on to be heard upon the motion of the defendant, E F, and affidavits for (and against) a change of venue to an adjoining county, and upon consideration whereof * the court does overrule said motion, to which ruling and finding the said defendant at the time excepted.

(If the motion is sustained after the *, add)—the court being of the opinion that a fair and impartial trial of this cause can not be had in this county, does sustain said motion; it is therefore ordered that the venue herein be changed to the adjoining county of ———, and it is further ordered that the clerk of this court transmit to the clerk of the court of common pleas of said county of ——— the original indictment, pleadings and all other papers filed in this cause, together with a certified copy of this and all other entries and orders made in this cause, within ten days from this entry.

Entry—Order for change of venue, and appointing assistant counsel.

(Title.) Indictment for ———.

On motion of the ———, and it being made to appear to the court by affidavits, that a fair and impartial trial of this case can not be had in this county; it is ordered and directed that the venue herein be, and the same is hereby, changed to

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he adjoining county of ———. And on application of the prosecuting attorney herefor, R W, Esq., is hereby appointed to assist in the further prosecution of the ase. And it is hereby ordered that the witnesses for the state enter into recog-izance to appear before the common pleas court of the said county of ———.

Sec. 13637. Proceedings on change of venue.

When the venue is changed, the clerk of the court of the county in vhich the indictment was found shall make a certified transcript of the proceedings in the case, which, with the original indictment, he shall ransmit to the clerk of the court of the county to which such case is ent, and the trial shall be conducted as if the indictment had been ound in that county. The prosecuting attorney of the county in which he indictment was found shall take charge of and try such case, and he court, on application, may appoint one or more attorneys to assist im in the trial and allow such compensation as it deems reasonable. R. S. § 7264; 93 v. 7; 68 v. 105, § 1; S. & C. 1183.)

The duties of a clerk of the court of common pleas are ministerial and non-udicial, and in a proceeding in mandamus to compel him to obey an order of the ourt of which he is clerk, allowing a change of venue in a cause pending in said ourt, and directing him to transmit the papers and pleadings in said cause to the ourt of common pleas of the county to which the place of trial of said cause has een changed, such clerk can not set up as a defense, and have adjudicated in such andamus proceeding, the invalidity of such order or the want of jurisdiction in e court to make it. State, ex rel., v. Chapman, 67 O. S. 1.

This section authorizes the common pleas court sitting in the county to which e case has been removed to send the jury in a body to the county in which the ime was committed to view the premises. Jones v. State, 51 O. S. 331.

ec. 13638. Costs on same.

The cost accruing from a change of venue, including the compensa-on of the attorneys so appointed, the reasonable expense of the prose-uting attorney incurred in consequence of the change of venue, the ees of such clerk and the sheriff, and the fees of the jury sitting in the rial of the case in the court of the county to which the venue is changed, hall be allowed and paid by the commissioners of the county in which uch indictment was found. (R. S. § 7264; 93 v. 7; 68 v. 105, § 1; . & C. 1183.)

Costs.—Where, in a criminal case, the venue is changed and the state fails convict or the defendant proves insolvent, the county in which the indictment is ound is not liable for the fees of the sheriff of the county in which the trial was d. Section 7264, Revised Statutes, prescribing a course of procedure in such ses, does not affect the right of that officer to compensation. The only compen-tion which sheriffs are entitled to receive in cases where the state fails to convict the defendant proves insolvent, is the allowance not exceeding three hundred dol-rs provided for by § 1231 of the Revised Statutes. Commissioners v. State *ex rel.*, O. S. 373.

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The compensation allowed by the court to the assistant prosecutor under § 7264 Revised Statutes, is by that section made part of the costs; and such allowance i not conclusive as against the board of county commissioners, but the same may b reduced by the board before allowance and payment, to such sum as in its judgmen is just and reasonable. Com'rs *et al.* v. State, *ex rel.* Jones, 60 O. S. 475.

The fees of the sheriff of a county to which, under favor of § 7264, Revise Statutes (G. C., § 13638), a criminal prosecution has been removed for trial, fo services rendered in and about the trial of such case, should be allowed and pai by the commissioners of the county in which the indictment was found. Thurlo v. Board, 81 O. S. 447.

The "costs" of the case, which the county where the indictment was found ha to repay the county to which the case has been removed for trial, as provided b § 7264, Revised Statutes, do not include the expenses, incurred for securing a jur to try the cause. State, *ex rel.* Com'rs of Gallia Co. v. Com'rs of Meigs Co., 1 C. C. 26; 7 O. C. D. 351.

View of premises.—When the venue in a criminal cause has been changed the court of common pleas sitting in the county to which the cause has been re moved for trial, is authorized, by §§ 7264 and 7283, Revised Statutes, to send th jury, in a body, to the county in which the crime was committed, and the indictmen found, to view the *locus criminis.* Jones v. State, 51 O. S. 331.

Sec. 13639. Warrant.

When a court orders a change of venue, a warrant shall be issue by the clerk thereof, directed to the sheriff, commanding him to conve the prisoner to the jail of the county where he is to be tried, there t be kept until discharged by law. (R. S. § 7265; 66 v. 305, § 123; S. C. 1184.)

Warrant for removal of prisoner on change of venue.

State of Ohio, ——— county, ss.:

To the sheriff of said county, greeting:

Whereas, at the ——— term, A. D. 19—, of the court of common pleas of sai county, an indictment was duly found and returned by the grand jury of sai county against one E F for the crime of ———, committed in said county, an whereas, afterwards, on motion and affidavits the court ordered a change of venu in said cause to the court of common pleas of ——— county.

Now, therefore, you are hereby commanded him, the said E F, safely t convey to the jail of ——— county, and him deliver to the jailer thereof, to be h him safely kept until the said E F shall be discharged by due course of law.

You will make due return of this writ and of your proceedings thereunder.

Given under my hand and the seal of said court, this ——— day of ——— A. D. 19—.

[SEAL.] N M, Clerk of the Common Pleas Court,
——— county, Ohio.

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ec. 13640. Recognizance of defendant.

When the defendant is charged with a crime or offense bailable by aw, and, at the date of the order changing the venue, is under bond or his appearance at the county from which the venue is changed, the ourt may fix in the order the amount of recognizance such defendant hall give for his appearance at the first day of the next term of the ourt to which the venue is changed, and the clerk shall take it as in ther cases, and forward such recognizance with the record. (R. S. 7265; 66 v. 305, § 123; S. & C. 1184.)

ec. 13641. Witness to be recognized.

When a change of venue is ordered the court shall recognize the itnesses of the state to appear before the court in which the prisoner to be tried. (R. S. § 7266; 66 v. 305, § 124; S. & C. 1184.)

Entry—Recognizances of witnesses taken.

(Title.) Indictment for ———.

This day came the witnesses herein, and entered into recognizance before the urt in the amounts, and with the sureties, severally set opposite their names, conioned for their appearance on the ——— day of ———, 19—, before the common eas court of the county of ———, to which the venue of this case has been anged, viz.:

ames of Witnesses.	Amount of Recog.	Names of Sureties.
I. C. D.	$300.	R. A.
etc.	etc.	etc.

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CHAPTER X.

TRIAL AND PROCEEDINGS INCIDENT THERETO.

JURIES.

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JURIES.

Sec. 13642. Venire for jury in capital cases.

When a person indicted for a capital offense pleads not guilty, the clerk, on the precipe of the prosecuting attorney, shall draw from the jury-box, as in other cases, thirty-six ballots, and issue to the sheriff a venire for the persons whose names are so drawn, for the day fixed for the trial; such venire shall be served and returned by such sheriff at

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ast fifteen days before the day so fixed. If a person named therein dead, insane, absent, removed from the county, or not an elector ereof, or has been convicted of felony and not pardoned, the sheriff all note the fact in his return. (R. S. § 7267; 72 v. 4, § 125.)

It is not requisite that a venire for a special jury, in a case of murder in the st degree, should be entitled as of the case pending, or state the name of the rson of whose murder the indictment charges the accused. Loeffner v. State, O. S. 598.

Where, in a capital case, a person not summoned as a juror personates one o was returned on the venire, sits at the trial and joins in a verdict of guilty, e verdict will be set aside and a new trial granted, it appearing that neither the cused nor his counsel was guilty of laches. McGill v. State, 34 O. S. 228.

Sections 7267 to 7275, inclusive, of the Revised Statutes, are not repealed by e act of March 29, 1881 (78 v. 95), in respect to impaneling juries in capital ses, or affected otherwise than in substituting the wheel, therein providing for, place of the box from which the names of electors shall be drawn for jury service. cHugh v. State, 38 O. S. 153.

Upon the trial of a capital offense the first thirty-six persons summoned who swer to their names, and who are without the disqualifications named in the xt section, constitute the panel from which the jury for the trial of the case is be chosen; but if so many of this number be set aside on challenge as will not ave twelve persons competent to serve, the vacancies must be filled in the manner rected by G. C. § 13650. Bach v. State, 38 O. S. 664.

A return by the sheriff, as to some of the jurymen named in a venire facias, at they "can not be found in the county," is equivalent to a return that they are bsent from the county," and authorizes the clerk to issue an alias venire facias. avis v. State, 25 O. S. 369.

The right of the accused to be present at the drawing of the jury given by y ordinance, does not apply to the regular jurors, but only to those drawn to l the panel. Molitor v. State, 6 C. C. 263, 3 O. C. D. 445.

A jury whose names have been placed in a wheel by the jury commissioners, en though the latter are only de facto officers, and drawn out in accordance with e provisions of G. C. § 11419 et seq., is a legally constituted jury. The case of officer de facto can not be questioned collaterally. State v. Krause, 1 N. P. 91, O. D. 122.

An accused person, who has been jointly indicted with others for murder in the st degree, can not complain of the overruling by the court of his challenge to the ry array, where this particular defendant has been brought to trial upon election the prosecuting attorney, and a copy of the venire, summoned in the case as ainst all the defendants, was served upon him three days before the day set for s trial. Watha v. State, 14 C. C. (N.S.) 145, 24 O. C. D. 60 (motion for leave erruled, 9 O. L. R. 123).

Error will not lie to the overruling of a challenge to the jury array, on the ound that names had been placed in the jury wheel of persons who were known have actively favored the "drys" in a recent local option election and the crime which the defendant was accused grew out of a contest over the illegal sale of uor, if it appear that there was an entire absence of evidence of any kind tend- g to show that the jury commission placed in the jury wheel names of persons o did not fulfill the qualification of being judicious and discreet. Watha v.

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State, 14 C. C. (N.S.) 145, 24 O. C. D. 60 (motion for leave overruled, 9 O. L. R. 123).

Entry for a jury in a capital case.

(Title.) Indictment for ———.

This day came the prosecuting attorney on behalf of the State of Ohio, and filed in the office of the clerk of courts his precipe for a jury of thirty-six qualified persons, to be and appear before this court on the ——— day of ———, A. D. 19—, at — o'clock a. m., at the courthouse in said county; thereupon the clerk in the presence of the court and in the presence of ———, the sheriff of said county, drew from the jury wheel, as provided by law, thirty-six names, to-wit (give the names), and thereupon the said clerk issued to the said sheriff a venire facias to summon the persons so drawn to appear before our said court on the ——— day of ———, A. D. 19—, at — o'clock a. m., at the courthouse in the said county, then and there to act as jurors in the said cause; and of the said venire to make due return according to law on or before the ——— day of ———, A. D. 19—.

Sec. 13643. Venire for additional jurors.

If it appear to the clerk, by the return of the sheriff, that a person named in the venire is dead, insane, absent, removed from the county, or not an elector thereof, or has been convicted of a felony and not pardoned, the clerk shall draw from the box a number of ballots equal to double the number of such persons dead, absent or so disqualified, and issue to the sheriff a venire for them, for the day fixed for the trial. The sheriff shall serve and return such venire as soon as possible, in the manner provided in the next preceding section. If it appear to the clerk, from such return, that the names of thirty-six qualified jurors are not in the venires, he shall draw ballots and issue venires, to be served and returned in like manner, until the required number thereof are summoned. (R. S. § 7268; 72 v. 4, § 125.)

A return by the sheriff, as to some of the jurymen named in a venire facias, that they "can not be found in the county," is equivalent to a return that they are "absent from the county," and authorizes the clerk to issue an alias venire facias. Davis v. State, 25 O. S. 369.

The right of a defendant, under this section, to have ballots drawn from the box to make the number of competent jurors thirty-six, exists only when the deficiency arises from the absence of jurors, or by reason of the grounds of incompetency named in G. C. § 13643. To supply the place of jurors challenged for other causes, talesmen should be called from the bystanders, as provided in G. C. § 13650, and where the record fails to show the ground of challenge, it will not be presumed that the challenge was made for any cause stated in G. C. § 13643. Morehead v. State, 34 O. S. 212.

If so many of the original thirty-six persons summoned are set aside on challenge that there are not left twelve persons competent to serve, the vacancies so caused must be filled in the manner directed by G. C. § 13650; and it is error for the court, against the objection of the prisoner, to order a special venire to

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for persons to fill such vacancies whose names are to be drawn from the jury Bach v. State, 38 O. S. 664.

A second venire issued under this section containing among others, the name F. H., was returned served upon him, but in fact was served on J. C. H., who ring and informing the court that his name was J. C. H. and not J. F. H., irected by the court to stand aside, to which order no objection was made. Held, appearing that the officer had acted in bad faith, or that the accused had been d in any of his substantial rights, the error if any was committed afforded no d for reversal. McHugh v. State, 42 O. S. 154.

13644. Court may order additional names to be drawn.

he first thirty-six jurors answering to their names at the trial, and out the disqualifications named in the next preceding section, shall itute the panel. If it appears to the court upon the impaneling ch jury that there are not thirty-six jurors summoned and present, out such disqualifications, the court may, and, upon motion of the ndant, shall order the clerk to draw from the box, as in other cases, fficient number of ballots to make thirty-six competent jurors. (R. 7269; 72 v. 4, § 125.)

he right of a defendant, under § 3, chapter 6, of the penal code (§ 13644), to ballots drawn from the box to make the number of competent jurors thirty- xists only when the deficiency arises from the absence of jurors, or by reason grounds of incompetency named in § 2. To supply the place of jurors chal- l for other causes, talesmen should be called from the bystanders, as provided , and where the record does not show the ground of challenge, it will not be med that the challenge was made for any cause stated in § 2. Morehead v. , 34 O. S. 212.

13645. Service and return of venire.

he sheriff shall serve and return the venire as is provided for the ice and return of such writs in other cases. (R. S. § 7270; 66 v. § 126.)

Form of a special venire in a capital case.

of Ohio, ——— county, ss.:

To O P, Esq., sheriff of said county, greeting:

Ve command you that you summon the following named persons, to-wit (give ames of the persons drawn), to be and appear before our court of common of the said county of ———, at the courthouse in ———, on the ——— day ———, in the year of our Lord one thousand nine hundred and ———, at nine k A. M., and so from day to day until discharged, then and there to serve as jurors in and for the said county, in the case of The State of Ohio v. E F, on ndictment for murder in the first degree. And have then and there this writ.

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In testimony whereof, I, the clerk of the said court of common pleas of sa county of ———, have hereunto set my hand and affixed the seal of said court ———, this ——— day of ———, A. D. 19—.

J M, Clerk,

(L. S.) Court of Common Pleas, ——— Co., O.

Form of summons to be delivered to each juror.

State of Ohio, ——— county, ss.:

I am commanded to summon you to appear before the court of common ple of said county, at the courthouse in ———, on the ——— day of ———, A. 19—, at nine o'clock A. M., and so from day to day until discharged; then and the to serve as petit juror in and for said county, in the case of The State of Ohio E F, on an indictment for murder in the first degree.

O P, Sheriff of ——— county, O.

Return of the special venire in a capital case.

January 11, 19—. The following named jurors were severally summoned by m as within required, on the days and in the manner hereinafter specified:

NO.	NAMES.	RESIDENCE.	WHEN SERVED.	HOW SERVE

(Give the names of the persons served, and the time and manner of servic

The following named persons are dead (or, insane, absent, removed from t county, etc.)

F P, Sheriff of ——— county, O.

Fees: $———.

Sec. 13646. Proceedings when two or more persons are indicted for capital offense.

When two or more persons are jointly indicted for a capital offens each of such persons shall be separately tried, and the clerk shall mal out a venire, as provided in sections thirteen thousand six hundred ar forty-two and thirteen thousand six hundred and forty-three, for t trial of each person so indicted. (R. S. § 7271; 66 v. 306, § 12 S. & C. 1190.)

A venire issued in a case where two or more are jointly indicted for a capit offense, may be used in the trial of one separately, where a copy thereof was serv upon him three days before the day set for his trial. Watha v. State, 14 C. (N.S.) 145 (motion to file petition in error overruled).

Sec. 13647. Defendant's peremptory challenges.

A person, indicted for a capital offense, pleading not guilty, sha be entitled to challenge sixteen of the jurors peremptorily. (R. § 7272; 84 v. 86; 66 v. 306, § 128; S. & C. 1181.)

Persons on trial entitled to peremptory challenge of jurors, may challenge f cause, and reserve their peremptory challenge up to the actual swearing of the ju Hooker v. State, 4 O. 348.

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the impaneling of a jury for the trial of a person indicted for murder in st degree, he claimed the right to reserve his peremptory challenges until a nel of twelve, not liable to successful challenge for cause, should be selected. urt refused this, and required both parties to make their peremptory chal- after having first exhausted their challenges for cause, to each juror as called, pon failure of the parties to make any valid challenge, ordered the juror, ed, at once to be sworn as such. *Held*, that in thus selecting the jury, there error to the injury of the defendant. Schufflin v. State, 20 O. S. 233.

a trial of an indictment for murder in the first degree, it is not error for rt to require the defendant to decide whether he would exercise his right of tory challenge to each juror as called, and not set aside for cause, and in not g him to wait until twelve persons not challenged for cause were in the box. an v. State, 4 C. C. 141; 2 O. C. D. 466.

a trial for murder in the first degree, the defendant is not entitled to more venty-three peremptory challenges. Martin v. State, 16 O. 364.

hen the capital offense has been nollied, the defendant is only entitled to remptory challenges. Goins v. State, 46 O. S. 457.

defendant on trial in a criminal case, for other than a capital offense, is l to challenge but two jurors peremptorily.

e last paragraph of § 5177, Revised Statutes (G. C. § 11439), as amended 9, 1902 (95 O. L. 308), giving to each party the right to challenge peremp- four jurors, furnishes the rule and determines the right of peremptory ge, only in civil causes. It has no application in criminal cases. Stevenson e, 70 O. S. 11.

3648. Copy of panel to be given the accused.

copy of the panel of the jury returned by the sheriff shall be de- l to a person so indicted at least three days before the day of (R. S. § 7273; 66 v. 307, § 129; S. & C. 1182.)

defendant being charged with murder in the first degree, a copy of the panel jury returned by the sheriff was delivered to him less than three days the day first fixed for his trial, but at that time the case was reset for trial han three days later. The case was then tried, against the objection of the nt that the copy of the panel was not served on him at least three days the trial. There was no error in this. Thurman v. State, 4 C. C. 141; 2 . 466.

der the rule that only matters which are brought into the record can be red by the circuit court on review, a verdict of conviction will not be set n the ground that a true copy of the panel as returned by the sheriff was ivered to the accused as required by § 7273, Revised Statutes (G. C. § 13648), he irregularity complained of is not carried into the bill of exceptions but ght to the attention of the court by an affidavit to which is attached a paper and what purports to be a copy of the jury panel. Williams v. State, 11 . S. 4; 20 O. C. D. 342. Affirmed 53 W. L. B. 28.

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Sec. 13649. Challenge, peremptory and for cause.

The prosecuting attorney may peremptorily challenge four of t panel, and he and the defendant may challenge jurors for cause. (S. § 7274; 66 v. 307, § 130; 97 v. 316.)

Challenge to the array, after the impaneling of the jury has been begun, com too late. Ickes v. State, 16 C. C. 31; 8 O. C. D. 442.

Mere irregularities and defects, not of essence, in the preliminary proceedin of selecting, drawing, and summoning a jury, either grand or petit, affords prop grounds of challenge to the whole array or to individual members, but are not ava able and supply no sufficient basis for a motion to quash an indictment, or for plea in abatement; nor will an indictment be held invalid for any defect or imp fection which does not tend to the prejudice of a substantial right of the defenda Blaney v. State, 17 C. C. 486; 9 O. C. D. 616.

On the trial of an indictment for murder in the first degree, the prosecuti attorney has two peremptory challenges. Fouts v. State, 8 O. S. 98.

The examination of persons called to act as jurors is limited to such matt as tend to disclose their qualifications in that regard, under the established pro sions and rules of law, and hypothetical questions are not competent when th evident purpose is to have the jurors indicate in advance what their decision w be under a certain state of the evidence or upon a certain state of facts. State Huffman, 86 O. S. 229.

In an examination as to the qualification of jurors to sit in a trial for mur in the first degree, it is not error for the state to ascertain by proper questi whether a prospective juror would insist on a recommendation of mercy, in event that the verdict were to be based on circumstantial evidence. Selvag v. State, 19 C. C. (N.S.) 88, 25 O. C. D. 139 (affirmed, 86 O. S. 366).

Sec. 13650. Jury for trial of a person charged with capital offens when venire to issue, etc.

Jurors summoned, as provided by the first three sections of t chapter, not set aside on challenge, with bystanders having the leg qualifications as make the number of twelve, or, if the whole array set aside, twelve of such bystanders having such qualifications and n set aside on challenge, shall be a lawful jury for the trial of a prison charged with a capital offense. Either party may demand and have special venire to fill the panel. When it is necessary to summon tal men, the court, on motion of either party, shall select them, and iss forthwith a venire for such number having the qualifications of jur as is necessary. Such jurors shall appear forthwith, or at such ti as is fixed by such court; but a person in or about the courthouse sh not be selected, without the consent of both parties. After a cause h been assigned for trial and a jury for the trial thereof has been dra

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he jury so drawn shall be discharged, and a new jury drawn, as here-
s herein provided, and the cause continued to another term of court,
n provided for the trial of such cause. (R. S. §§ 5173, 7275; 70 v.
70, § 10; 89 v. 219; 78 v. 181; 66 v. 307, §§ 131; S. & C. 1182.)

On a trial for murder, where one of the panel announced by the sheriff is xcused on his own application, it is not error in the court to refuse to order the heriff to summon a bystander in his place before exhausting the panel. Martin State, 16 O. 364.

Upon the trial for a capital offense, the first thirty-six persons summoned who nswer to their names, and who are without the disqualification named in § 7268 the Revised Statutes, constitute the panel from which the jury for the trial of e cause is to be chosen; but if so many of this number be set aside on challenge will not leave twelve persons competent to serve, the vacancies so caused must filled in the manner directed by § 7275, and it is error for the court, against e objection of the prisoner, to order a special venire to issue for persons to ll such vacancies whose names are to be drawn from the jury box. Bach v. tate, 38 O. S. 664.

Where, in a capital case, a person not summoned as a juror personates e who was returned on the venire, sits at the trial and joins in a verdict of uilty, the verdict will be set aside and a new trial granted, it appearing that either the accused nor his counsel was guilty of laches. McGill v. State, 34 O. S. 228.

Sections 7267 to 7275, inclusive, of the Revised Statutes, are not repealed the act of March 29, 1881 (78 v. 95), in respect to impaneling juries in capital ses, or affected otherwise than in substituting the wheel in place of the box. cHugh v. State, 38 O. S. 153.

The amendment of April 18, 1881 (78 v. 181), authorizes a special venire, on the demand of either party, as provided in § 5173, which requires the court select the talesmen. Ib. 155.

A motion to continue a case is a matter addressed to the sound discretion of e court and, therefore, an order overruling such a motion can not be reviewed error. Loeffner v. State, 10 O. S. 598.

Reviewing courts will not reverse a judgment of a trial court because of a mitation of cross-examination of a witness, unless it clearly appears that there s been an abuse of discretion therein, resulting in manifest prejudice to the mplaining party. Fabian v. State, 97 O. S. 184.

The proof of motive is not essential to a conviction of the crime of homicide, d where the commission of the crime by the accused is clearly established by rect evidence a judgment of conviction will not be reversed because of the follow-g instruction: "The law does not require the state to prove motive in this se. The presence or absence of motive shown by the evidence may be considered you in determining intent, or its presence or absence in the mind of the accused, that if you find beyond a reasonable doubt that the defendant is guilty under e instructions which the court gives you, then you should find him guilty hether or not a motive has been established." Fabian v. State, 97 O. S. 184.

Prejudice will not be presumed to have resulted to the rights of a defendant om the fact that a juror in the case was a member of a grand jury which in e investigation of a charge against a person other than the defendant had ceived evidence of a witness who later testified similarly upon the trial of the efendant, where it appears that such evidence did not relate to the merits of e charge in the latter case and it does not appear that the juror untruthfully nswered questions asked upon his voir dire examination. Fabian v. State, 97 S. 184.

Where the objections by the defendant, to the array of jurors summoned, is stained, the court may, under § 7275, make out a special venire of twenty-four ames upon his own motion, and give it to the clerk and have such jurors sum-oned to try the case. Jones v. State, 14 C. C. 35, 7 O. C. D. 305.

While the right exists under G. C. § 11436, to challenge the whole array of rors, such challenge must be made before the impaneling of the jury has begun. kes v. State, 16 C. C. 31, 8 O. C. D. 442.

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Mere irregularities in the preliminary proceedings of selecting a jury afford proper ground for a challenge to the array or to individual members, but not for a motion to quash or plea in abatement. Blaney v. State, 17 C. C. 486, 9 O. C. D. 616.

A court has no authority to discharge the entire panel of the petit jury because it or they were "so interested in causes coming on further to be heard in this court, as to disqualify them from sitting thereon." Dieter v. State, 12 C. C. (N.S.) 97, 21 O. C. D. 299.

It is proper to overrule a challenge to the array on the ground that the names of "drys" were placed in the jury wheel and the crime resulted from a contest over the illegal sale of liquor and there is no evidence that the jury commission placed in the wheel names of persons who were not "judicious" and "discreet." Watha v. State, 14 C. C. (N.S.) 145 (motion to file petition in error overruled).

A plea in abatement does not lie to an indictment for murder in the first degree, where based on the ground that the judges of the common pleas court in appointing the jury commission failed to designate the number of names which the commission should place in the jury wheel of persons to serve as grand and petit jurors during the current year. State v. Cleveland, 9 O. L. R. 203.

Omitting to throw aside a ballot containing the name of a juror who has died or removed, renders the whole array subject to challenge, and a refusal to issue a new venire is error. Jones v. State, 1 Dec. Rep. 390, 8 W. L. J. 508.

Entry—Jury formed in capital cases.

(Title.) Indictment for murder in the first degree.

This day came the prosecuting attorney on behalf of the State of Ohio, the defendant, E F, being brought into court in the custody of the sheriff, and his counsel also coming.

And the venire facias for the jury in this case heretofore issued according to law, returnable this day, was duly returned by said sheriff, with his indorsement thereon, as follows: (copy in full).

And said venire facias being called in open court, all of the above-named persons appeared in answer thereto, except F G, J H, etc., and the court ordered that a rule be issued for F G.

And also the *alias* venire facias heretofore issued according to law, returnable this day, was duly returned by said sheriff, with his indorsement thereon, as follows: (copy in full).

And said *alias* venire facias being called in open court, all of the above-named persons appeared in answer thereto.

And upon the further call of said venire, and said *alias* venire, for cause shown, the court excused F G, etc., and the defendant, by his counsel, challenged G H for cause, and the challenge was sustained; and also challenged peremptorily D E, etc.; and R L and J B being separately tried and accepted, were severally sworn as jurors in this case.

And thereupon the court adjourned the further hearing of the case until tomorrow morning at 10 o'clock.

Same, second day.

(Title.) Indictment for murder in the first degree.

This day came the prosecuting attorney, on behalf of the State of Ohio, the defendant being brought into court in custody of the sheriff, and his attorney also

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ning. Also came R L and J B, heretofore accepted and sworn as jurors in this se.

(Continue with a record of all proceedings had until the jury is complete, and en say:)

The panel being complete, and the following named persons having been tried d accepted, to-wit:

1. R. L. 2. G B, etc.

re duly impaneled and sworn to well and truly try, and true deliverance make, tween the State of Ohio and the prisoner at the bar, E F. And the trial proded, etc.

c. 13651. What shall be a lawful jury in other criminal cases.

In all other criminal cases the jury summoned and impaneled acrding to the law relating to the summoning and impaneling of juries other cases, shall try the accused. (R. S. § 7276; 66 v. 307, § 132.)

It is no ground for reversal of judgment in a criminal case, that the court, fore the day set for trial, discharged some of the jurors in attendance on grounds personal explanation and excuse, and upon their unsworn statements. Bond v. ate, 23 O. S. 349.

It is no ground for reversal of judgment in a criminal case, that the court fused to issue attachments against non-attending jurors. Bond v. State, 23 S. 349.

A statute which authorizes a penalty by *fine only* upon a summary conviction der a police regulation of an immoral practice prohibited by law, although imisonment, as a means of enforcing the payment of the fine, is authorized, is not conflict with either § 5 or § 10 of article 1 of the constitution, on the ground at no provision is made for a trial by jury in such cases. Inwood v. State, 42 O. S. 6.

Defendant not entitled as a matter of right to have cause tried by the court, stead of a jury. Ickes v. State, 16 C. C. 31; 8 O. C. D. 442.

The statute requires the jurors to have the qualifications of electors, and to be useholders. Suppose the jurors do not possess those qualifications, it is only a use of challenge, and if waived by the accused, he cannot avail himself of the jection on error. By such waiver he consents to their qualifications, and submits be tried by them. Shoemaker v. State, 12 O. 43, 53.

Upon trial for the higher grade of crimes the accused cannot waive a jury and nsent to be tried by the court. Williams v. State, 12 O. S. 622.

As to minor offenses there can be no doubt but that the defendant can waive a ry and submit to be tried by the court. The failure to demand a jury must be ld to be a waiver thereof. Billigheimer v. State, 32 O. S. 435.

In a prosecution under R. S. § 3718a, (G. C. §§ 13423 and 13432 to 13440 insive), it is not necessary that the accused should waive a trial by jury in writg to give the magistrate jurisdiction to proceed to final judgment in the case ithout a jury. Martindale v. State, 2 C. C. 2; 1 O. C. D. 328.

In an information before the police court for obtaining money under false prenses, the constitutional right of trial by jury is not infringed, when the option

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is given to the accused to have the issue tried by the court or the jury, and he submits the case to the court. Dillingham v. State, 5 O. S. 280.

The fact that one of the jury commissioners was not a freeholder in Ohio is a mere irregularity, and to warrant a new trial on that ground, prejudicial error must have intervened. Iekes v. State, 16 C. C. 31; 8 O. C. D. 442.

As to struck juries see the following cases: State v. Ermston, 4 C. C. 81; 2 O. C. D. 431. Whitehead v. State, 10 O. S. 449. Billingheimer v. State, 32 O. S. 435. Quigley v. State, 5 C. C. 638; 3 O. C. D. 310. Hulse v. State, 35 O. S. 421.

A defendant on trial in a criminal case, for other than a capital offense, is entitled to challenge but two jurors peremptorily.

The last paragraph of § 5177, Revised Statutes (G. C., § 11439), as amended April 29, 1902, (95 O. L. 308), giving to each party the right to challenge peremptorily four jurors, furnishes the rule and determines the right of peremptory challenge only in civil causes. It has no application in criminal cases. Stevenson v State, 70 O. S. 11.

Sec. 13652. Challenge in cases where no other provision is made.

Except as otherwise provided, the prosecuting attorney and every defendant, may peremptorily challenge four of the panel, and any of the panel for cause. (R. S. § 7277; 99 v. 348; 66 v. 307, § 133; S. & C. 1182.)

Persons on trial entitled to peremptory challenges of jurors may challenge for cause and reserve his peremptory challenge. Hooker v. State, 4 O. 348.

Where several defendants are indicted for a joint offense, and all are put upon a joint trial, each must be allowed his separate peremptory challenges of jurors. Bixbe v. State, 6 O. 86.

Where several defendants are put upon trial at the same time, under the same indictment, the prosecuting attorney has but two peremptory challenges. Mahan v. State, 10 O. 232.

On the impaneling of a jury for the trial of a person indicted for murder in the first degree, he claimed the right to reserve his peremptory challenges until a full panel of twelve, not liable to successful challenge for cause, should be selected. The court refused this, and required both parties to make their peremptory challenges after having first exhausted their challenges for cause, to each juror as called, and, upon failure of the parties to make any valid challenge, ordered the juror so called at once to be sworn as such. *Held*, that in thus selecting the jury, there was no error to the injury of the defendant. Schufflin v. State, 20 O. S. 233.

By the law relating to struck juries, "the first twelve of those who shall appear, and are not challenged for cause, or set aside by the court, shall be the jury, and shall be sworn to try the said issues." After these twelve, therefore, have passed into the box unchallenged for cause, the party demanding the struck jury has no right of peremptory challenge. State v. Moore, 28 O. S. 595.

A defendant in a criminal case is entitled to two peremptory challenges. Having thus challenged one of a special venire, and passed his second challenge, the special venire was exhausted and a new juryman called. Defendant then claimed the right to a second peremptory challenge, which was refused. This was error. Koch v. State, 32 O. S. 352.

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defendant in a criminal trial is only entitled to two peremptory challenges, he is on trial for a capital offense; and the fact that he had been indicted for r in the first degree; that a jury of thirty-six had been summoned and were endance for his trial; that a *nolle* was then entered as to the charge of r in the first degree; and the fact that a jury to try him for murder in the degree was being impaneled from the thirty-six jurors so in attendance did large his right in this respect. Goins v. State, 46 O. S. 457.

ee Mimms v. State, 16 O. S. 221. Erwin v. State, 29 O. S. 186. Hartnett v. 42 O. S. 568.

ee § 13655, as to the number of peremptory challenges in joint trials.

13653. Causes of challenge of jurors.

ne following shall be good causes for challenging a person called uror on an indictment:

irst. That he was a member of the grand jury which found such ment;

econd. That he has formed or expressed an opinion as to the guilt nocence of the accused; but if a juror has formed or expressed such on, the court shall thereupon examine such juror on oath as to the ds thereof, and if such juror says that he believes he can render npartial verdict notwithstanding such opinion, and the court is ed that such juror will render an impartial verdict on the evi-, the court may admit him as competent to serve as a juror in case;

hird. In indictments for a capital offense, that his opinions pre- him from finding the accused guilty of an offense punishable death;

ourth. That he is related within the fifth degree to the person d to be injured, or attempted to be injured by the offense charged, the person on whose complaint the prosecution was instituted, or defendant;

fth. That he served on a petit jury drawn in the same cause st the same defendant, and such jury was discharged after hear- ne evidence, or rendered a verdict thereon which was set aside;

xth. That he served as a juror in a civil case brought against the dant for the same act;

venth. That he has been subpœnaed in good faith as a witness case;

ghth. That he is an habitual drunkard;

nth. Like challenges shall be allowed in criminal prosecutions allowed in civil cases. (R. S. § 7278; 81 v. 53; 69 v. 11, § 1; C. 1197.)

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Member of grand jury.—A challenge for cause to a juror, that he w member of the grand jury which found the indictment, can be made only b the jury is sworn. When no inquiry is made on the subject till after the ver the existence of such cause for challenge, though previously unknown to defendant and his counsel, will not necessarily entitle him to a new trial. v. State, 20 O. S. 228.

Where a juror arose, after the swearing of the jury, and stated that he been a grand juror, and thereupon the jury was dismissed and another jury paneled, it was held that the discharge of the first jury was the necessary r of the defendant's objection to proceed therewith and did not operate as acquittal. Stewart v. State, 15 O. S. 155.

For differences between the qualifications for grand and petit jurors, State v. Easter, 30 O. S. 542.

Formed or expressed opinion.—If a juror, when interrogated, says tha has formed no opinion respecting the guilt or innocence of the accused, and, verdict, it appears that before the trial he had said, "if he (the prisoner) is hung, there is no use of laws," a new trial should be granted. Busick v. S 19 O. 198.

Where a motion is made for a new trial in a criminal case, on the ground one of the petit jurors had, previously to his being called as a juror, expressed opinion that the accused was guilty, although, when interrogated in the jury before being sworn, he answered that he had neither formed nor expressed opinion on the subject, it is essential that the motion should be supported b affidavit showing that the fact of such objection was unknown either to the acc or his counsel, at the time the jury was impaneled. Parks v. State, 4 O. S.

Under the fourteenth section of the "act relating to jurors" (Swan's Stat § 492), a juror who had formed an opinion in a murder case was not compe although he stated that it would not influence his verdict. Fouts v. S 7 O. S. 471.

The expression by a juror, before the trial, of a hypothetical opinion, a the guilt or innocence of the accused, dependent upon a particular state of fact to the existence of which no opinion was given, does not constitute a suffic ground for a new trial in a criminal case. Loeffner v. State, 10 O. S. 598.

Where it appears that a juror has formed and expressed an opinion fou on newspaper statements or reports, or rumors or hearsay only, the court satisfied by examination that the juror will render an impartial verdict accept him. Cooper v. State, 16 O. S. 328.

The ruling of the court on a challenge for cause can not be reviewed, unless record shows that it contained all the evidence. Cooper v. State, 16 O. S. 328.

Cooper v. State, 16 O. S. 328, sustaining the constitutionality of subdivisi of this section, cited and approved. Spies v. Illinois, 123 U. S. 131.

When a new trial is asked on the alleged ground that one of the jurors previously expressed his opinion as to the prisoner's guilt, the overruling of motion will not be held erroneous, if the evidence of the fact of such expressio opinion is conflicting, or there is testimony tending to disprove it. Blackbur State, 23 O. S. 146.

Where a person called as a juror in a criminal case is challenged on the gro that he has formed or expressed an opinion as to the guilt or innocence of accused, if it shall appear that such opinion was formed upon reading what ported to be a report of the testimony of witnesses of the transaction, he is competent to serve as a juror in the case, and should be set aside by the co But if such opinion "shall appear to have been founded upon reading newsp statements, communications, comments, or reports, or upon rumor or hearsay, not upon conversations with witnesses of the transactions, or reading report their testimony, or hearing them testify," the person so challenged may be admi to serve as a juror, if he shall state "on oath, that he feels able, notwithstan such opinion, to render an impartial verdict upon the law and the eviden

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e court is satisfied that the juror is impartial and will render an impartial in the case. Frazier v. State, 23 O. S. 551.

person summoned as a juror, who states on his *voir dire* that he has or expressed an opinion touching the guilt or innocence of the accused, is *facie* incompetent; and such *prima facie* incompetency is not removed until been made to appear that such opinion was formed from reading mere news- statements, communications, comments, or reports, or upon rumor or hear- d not upon conversation with witnesses of the transaction, or reading reports r testimony, or hearing them testify, and that, notwithstanding such previ- formed or expressed opinion, the juror is able to render an impartial verdict he law and evidence. Frazier v. State, 23 O. S. 551, followed and approved; h v. State, 38 O. S. 153.

juror in a capital case who has formed or expressed an opinion as to the r innocence of the prisoner, which he thinks it would require evidence to , where the opinion is formed from newspaper reports, and not from reading ring the testimony of witnesses, or conversation with them, is not necessarily etent under Rev. Stats. § 7278; but if he testifies that he believes he would, cted, render an impartial verdict upon the evidence, and the court is of the pinion, he is a lawful juror. McHugh v. State, 42 O. S. 154.

person called as a juror in a criminal case, who clearly shows himself, on *ir dire*, not to be impartial between the parties, is not rendered competent ing that he believes himself able to render an impartial verdict, notwith- ng his opinions, although the court may be satisfied that he would render parital verdict on the evidence. Palmer v. State, 42 O. S. 596.

he discretion conferred upon the court by the second clause of § 7278, d Statutes, is a sound legal discretion, and may be reviewed and reversed for est abuse. Palmer v. State, 42 O. S. 596.

juror who states on his examination that he has formed an opinion on a affecting the guilt of the defendant, from having heard the circumstances crime related by one who claimed to know them, may, nevertheless, be com- to sit as a juror if he says on oath that he believes he can render an impartial t in the case, and the court is satisfied he can do so. The fact that the court ted him to sit as a juror is a sufficient finding that it was satisfied he could an impartial verdict. Goins v. State, 46 O. S. 457.

juror being examined on his *voir dire*, stated that from what he had talked ead about trials of co-defendants he had formed an opinion against the de- nt, which it would require testimony to remove, although he had nothing ally against him, and that the fact that the defendant had been indicted have weight with him unless defendant proved himself not guilty, and as the stands would require the defendant to prove his innocence; but it did not r that he had talked with or read the testimony of any witness, or had talked any one claiming to have knowledge of the facts, and it was shown on further nation that his opinion rested principally on the suspicion that the defendant ne of the gang that committed the crime, but that he did not assume to know o be a fact, and that if the court should instruct that he need not consider ct that the defendant had been indicted he could lay aside that fact and not er it in evidence against him, and finally that, notwithstanding any previous pinion or prejudice, he could render a fair and impartial verdict according to w, and the evidence, and the court, so believing, overruled the defendant's nge for cause. *Held*, that the facts do not show an abuse of discretion in so ling the challenge. McHugh v. The State, 42 O. S. 154, and Goins v. The 46 O. S. 457, approved and followed. Lindsey v. State, 69 O. S. 215.

BROWN'S SUPPLEMENT

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Upon a trial under an indictment for bribery, it is not competent to inqu of a prospective juror upon his voir dire whether he will stand upon his opin of not guilty, formed after due deliberation in the jury room, or will yield opinion merely for the purpose of reaching a verdict in the case. State v. H man, 86 O. S. 229.

The examination of persons called to act as jurors is limited to such matt as tend to disclose their qualifications in that regard, under the established pro sions and rules of law, and hypothetical questions are not competent when th evident purpose is to have the jurors indicate in advance what their decision be under a certain state of the evidence or upon a certain state of facts. St v. Huffman, 86 O. S. 229.

Under clause 2 of § 7278, Revised Statutes, where a person called as a ju is being examined upon the *voir dire* as to his qualifications to sit as a juror in case, states that he has formed or expressed an opinion as to the guilt or innoce of the accused, and the subsequent inquiry therein provided for is conducted counsel in the hearing and with the sanction of the court, this is a substan compliance with the requirement of the statute that "the court shall thereu proceed to examine such juror under oath," etc. And if no exception is then ta on this ground, it is not error for which the judgment will be reversed. McG v. State, 3 C. C. 551; 2 O. C. D. 318.

A juror in a criminal case, who states upon his *voir dire* that he has for or expressed an opinion as to the guilt or innocence of the accused which it take evidence to remove, is not rendered incompetent to serve under § 7278, vised Statutes, providing such opinion is formed from reading newspaper rep and not from reading or hearing the testimony of witnesses, or conversati with them, and that, notwithstanding the opinion formed or expressed, he render an impartial verdict upon the evidence adduced, and the court is also the same opinion. McHugh v. State, 42 O. S. 154; Blair v. State, 5 C. C. 496 O. C. D. 242.

The acceptance of such juror by the court is sufficient finding that the co is of opinion that the juror will render a fair and impartial verdict. Blair State, 5 C. C. 497; 3 O. C. D. 242.

A juror who answers upon his *voir dire* that he will not render a verdic guilty upon circumstantial evidence alone, but that he will require direct evide on the part of the state to do so, is properly rejected from the panel upon challenge of the prosecution. Blair v. State, 5 C. C. 497; 3 O. C. D. 242.

On the examination of a person called to serve as a juror on the trial o defendant charged with the crime of murder in the first degree, he testified t he did not know the accused, but had formed an opinion as to his guilt or in cence of the charge from reading a newspaper account of the transaction; that reading had created a bias or prejudice in his mind against the defendant, and t he would have it until it was removed; that he would enter upon the trial the case with that prejudice existing, to a certain extent, until he heard the te mony, and until it was removed, and that it would require evidence to remove But he further stated that he would try to lay aside all former opinions, and that believed he could do so and render an impartial verdict on the law and the evide and there was nothing disclosed in the evidence tending to show any feeling agai the accused on the part of such person, or any ground for such prejudice or b other than that arising from reading such newspaper account; and the court, be

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ed that he would render an impartial verdict, admitted him as competent to as a juror in said cause over the objection of the defendant. Such action of ourt is not error, for which the judgment should be reversed. Such person been peremptorily challenged by the defendant, thus exhausting his sixteen ptory challenges, the next person called as a juror was accepted both by the and the defendant, who then announced that he was satisfied with such as a juror, and with the jury as then constituted, which was then sworn npaneled. *Held*, that if the action of the court in overruling the challenge for to the person before mentioned was erroneous, it was not prejudicial to the ant. McCarthy v. State, 5 C. C. 628; 3 O. C. D. 306.

Where it appears that a juror has an opinion or prejudice formed from reading aper articles, the court may, if satisfied from his statements that he can put n or prejudice aside and render an impartial verdict on the evidence, admit uror as competent. It seems that the supreme court makes a distinction be- an opinion formed from reading newspaper reports, and an opinion formed eading reports of the evidence or formed from conversations with the witnesses. v. State, 14 C. C. 35; 7 O. C. D. 305.

he manifest purpose and intent of § 7278 of the statutes, in that part of it explicitly requires the court, when a juror says that he has formed or ex- d an opinion, to examine him as to the grounds of his opinion, is, that the might then ascertain how the juror reached his conclusion; whether it was re rumor and hearsay and not founded on any substantial basis, or in some way, and in such manner as would render it difficult for any man, however he might be, to lay aside the opinion before formed, particularly if the facts d to before the jury should substantially agree with what he had before and on which his opinion had been founded, and the effort of the court should have this clearly appear, and a limitation of the examination of the juror by for defendant to ascertain the weight of his opinion, is improper. Limerick e, 14 C. C. 207; 7 O. C. D. 664.

will be presumed in the absence of facts appearing to the contrary, that were proper reasons for excusing a juror and filling his place with another. . State, 11 C. C. 23, 5 O. C. D. 29.

e examination of jurors on their voir dire affords the best test as to r or not prejudice exists in the community against the defendant; and it appears that the opinions as to the guilt of the defendant of those for examination for jurors are based on newspaper articles, and that the s so formed are not fixed but would yield readily to evidence, it is not o overrule an application for a change of venue. Townsend v. State, 17 (N.S.) 380, 25 O. C. D. 408 (affirmed, 88 O. S. 584).

a trial for knowingly selling intoxicating liquor to a minor, the fact that osed juror admits that he has a prejudice against the business of selling ating liquors, does not sustain a challenge for cause The claim that the e fails to show that the accused knew of the prosecuting witness' minority, by the fact that the jury saw said witness. Lowther v. State, 18 C. C. 192.

pposition to capital punishment.—Where, on a trial for murder in the egree, a juror states that he is on principle opposed to capital punishment, at he believes his opinion will influence his decision against the law and idence, he may be challenged by the state for cause. Martin v. State, 16

venireman's opinion as to the wisdom or unwisdom of a recommendation cy upon a conviction of murder in the first degree is not subject to inquiry voir dire examination of the venireman. State v. Ellis, 98 O. S. 21.

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A juror who declared upon his voir dire that he would not render a ver of guilty upon circumstantial evidence alone is properly rejected. Blair v. St 5 C. C. 496, 3 O. C. D. 242.

In a trial for first degree murder, a proposed juror who states that he wo look upon the crime as greater because it was a police officer who was killed property challenged for cause. Dodig v. State, 16 C. C. (N.S.) 311 (judgment trial court on retrial affirmed, 83 O. S. 455).

A proposed juror in a first degree murder case, who, in answer to a quest by the prosecuting attorney as to what his mental attitude would be towar recommendation to mercy, if he should be clearly of the opinion, after hear the evidence, that the accused was guilty of the crime charged against him, sta that under the circumstances described in the question he would not recomm the accused to mercy, may be challenged for cause, but if not so challenged verdict of guilty without recommendation to mercy will not be reversed beca such juror served in the case. Mangano v. State, 17 C. C. (N.S.) 595.

In an examination as to the qualification of jurors to sit in a trial for mur in the first degree, it is not error for the state to ascertain by proper questi whether a prospective juror would insist on a recommendation of mercy, in event that the verdict were to be based on circumstantial evidence. Selvag v. State, 19 C. C. (N.S.) 88, 25 O. C. D. 139 (affirmed, 86 O. S. 366).

Former jury service.—The fact that a juror has served upon the trial o plea in bar is not a ground for challenge upon the subsequent trial of the accu under the indictment. Carano v. State, 3 C. C. (N.S.) 629, 14 O. C. D. 93 (affirm 69 O. S. 561).

Habitual drunkard.—Cited in Weis v. State, 22 O. S. 486.

Challenge in civil cases.—For challenges in civil cases, see G. C. §§ 11 and 11438.

In a capital case it is a good cause of challenge to jurors that they are electors and householders. Shoemaker v. State, 12 O. 43.

That a juror has served as such during the year next preceding the ti at which he is called and sworn, is not a good cause of challenge under the of February 8, 1847, unless it appear that such service was within a year p ceding the commencement of the present term of service. Bond v. State, O. S. 349.

Where the court made inquiries of the juror without eliciting ground challenge, and no challenge was in fact made, and no further diligence used by defendant to ascertain cause for challenge, judgment will not be reversed, althou a juror had served as a talesman within the next preceding twelve months such fact was unknown to the defendant. Wilder v. State, 25 O. S. 555.

This clause was not intended to apply to, or to include peremptory challeng but its purpose was merely to extend the right of challenge in criminal ca to include the grounds in civil cases. Stevenson v. State, 70 O. S. 11.

The discharge of a person called upon to serve upon a jury on the ground defective hearing is within § 5177, Revised Statutes (G. C. § 11438), and is prop Ickes v. State, 16 C. C. 31, 8 O. C. D. 442.

A jury is not disqualified because two of the witnesses who are to test have previously tesified to unlawful sales of liquor in a former case before same jury. State v. Kurrley. 3 N. P. 1, 4 O. D. 58.

A conviction of felony in another state does not disqualify the person c victed from acting as a juror in Ohio unless the crime was one which constitu a felony in Ohio. State v. Davis, 7 N. P. 650, 8 O. D. 680.

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Misnomer of juryman.—A second venire issued under Revised Statutes, 3, containing among other names, the name of J F H, was returned served him, but, in fact, was served on J C H, who appearing and informing the that his name was J C H, and not J F H, was directed by the court to stand to which order no objection was made. After the names on such venire called, and thirty-six jurors, independently of the juror named, appeared, el for the prisoner challenged the array, under Revised Statutes, § 5175, for misnomer, which challenge was overruled. Held, it not appearing that the had acted in bad faith, or that the accused had been injured by the mistake y of his substantial rights, the error, if any was committed, afforded no d for reversal. McHugh v. State, 42 O. S. 154.

Waiver of cause of challenge.—As a general rule, a party failing to make ry as to the competency of a juror at the time he is impaneled, will be held ve waived all objection to his competency; and it is not enough, in order to the case out of this general rule, for the party to show simply that at the of impaneling the jury he was ignorant of the fact of his incompetency, or red him to be competent; and the rule applies as well to jurors summoned special venire as to jurors drawn from the box. Kenrick v. Reppard, 23 333.

Where several defendants are put upon a joint trial, each must be allowed eparate peremptory challenges of jurors. Bixbe v. State, 6 O. 86.

Juror who has formed an opinion in a murder case, is not competent, although ates that it will not influence his verdict. Fouts v. State, 7 O. S. 471.

If the jurors do not possess the requisite qualifications, it is a cause for enge which may be waived, and such waiver is consent to their qualifications, hat the cause be tried to them. Shoemaker v. State, 12 O. 43.

The expression by a juror, before the trial, of a hypothetical opinion as to the or innocence of the accused, dependent upon a particular state of facts as to xistence of which no opinion is given does not constitute sufficient ground for a trial. Loeffner v. State, 10 O. S. 598.

Nor can the ruling of the court in overruling the motion for a new trial, or a enge to the competency of the juror, be reviewed, unless the record shows natively that it contains all the evidence submitted to the court below on the tion. Cooper v. State, 16 O. S. 328.

Cooper v. State, 16 O. S. 328, sustaining the constitutionality of subdivision this section, cited and approved. Spies v. Illinois, 123 U. S. Supreme Court,

Where the court, sua sponte, inquired of the jury, as directed by section 11 of act of 1873 (70 v. 167), without eliciting ground for challenge, and no chal- was in fact made, and no further diligence used to ascertain the ground for enge, the judgment will not be reversed, although the party against whom it rendered was at the time ignorant of the fact that a juror had served as a man within the next preceding twelve months. Wilder v. State, 25 O. S. 555.

A new trial will not be granted for errors in the rulings of the court on the ination of a juror on his voir dire, or to the refusal of the court to sustain a enge for cause, where the juror was rejected on a peremptory challenge, and defendant went to trial without exhausting his peremptory challenges. Mimms tate, 16 O. S. 221; Erwin v. State, 29 O. S. 186.

Nor where the objectionable juror was subsequently excluded from the panel he peremptory challenge of the state. Griffin v. State, 18 O. S. 438.

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The general rule is, that a party omitting to examine or challenge a jurc waives all objections to his competency. To take a case out of this rule, it is nc enough merely to show the ignorance of the party, or his disbelief of the disqualif cation of the juror; and this rule applies as well to jurors summoned upon speci venire as to jurors drawn from the box. Kenrick v. Reppard, 23 O. S. 333.

Where the juror arose, after the jury had been sworn, and stated that he ha been a member of the grand jury, and the defendant's counsel objected to procee ing with the jury, and it was accordingly discharged. Held, that the discharge the jury first impaneled was the necessary result of defendant's objection, and di not operate as an acquittal. Stewart v. State, 15 O. S. 155.

Differences between the qualifications of grand and petit jurors discusse State v. Easter, 30 O. S. 549.

If a juror has formed or expressed an opinion in relation to a portion of th facts embraced in the issue, but not upon the whole issue, and otherwise, stanc indifferent the allowance or refusal of the challenge is within the discretion the court. Dew v. McDivitt, 31 O. S. 139.

A defendant may waive his rights to challenge the jury impliedly as well expressly, and if he remain silent, when by speaking he could have obtained wha he desired, it is too late to complain after his case has proceeded to final adjud cation. Billingheimer v. State, 32 O. S. 439.

When no inquiry is made on the subject until after the verdict, the existen of such cause for challenge, though previously unknown to defendant and his cou sel, will not necessarily entitle him to a new trial. Beck v. State, 20 O. S. 22

The defendant, having challenged a juror for proper cause, which was refuse thereupon challenged the same juror peremptorily, and exhausted his perempto challenge before the jury was completed. Held, error. Hartnett v. State, 42 O. S. 56

A juror on being examined on the voire dire stated that he had both forme and expressed an opinion as to the guilt of the defendant, but further stated to t court that he believed that he could, notwithstanding such opinion, render a fa and impartial verdict on the evidence in the case. No further examination w made by either side, or any attempt made to ascertain the nature of such expre sion or the strength of such opinion, and he was sworn as a juror without a objection. This was a waiver of any objection to him on the ground that he ha formed or expressed such opinion. Schneider v. State, 2 C. C. 420, 1 O. C. D. 56

Where a party discovered the incompetency of a juror, after he was swor and made no objection before the verdict was rendered, he has waived his right challenge. Lowe v. McCorkle, 1 Dec. Rep. 352, 3 W. L. J. 64.

Sec. 13654. Challenges for cause, when made and how tried.

Challenges for cause shall be tried by the court on the oath of th person challenged, or other evidence, and shall be made before th jury is sworn. (R. S. § 7279; 66 v. 307, § 135.)

A person summoned as a juror for the trial of a criminal case was challeng for cause by the defendant, and the challenge was overruled; whereupon he w peremptorily challenged on behalf of the state, and excluded from the panel. He that the overruling of defendant's challenge could not have prejudiced him, and therefore, no sufficient ground for reversal of the judgment. Griffin v. State, O. S. 438.

Where, on the trial of a criminal case, a juror is challenged by the defenda for cause, and the challenge is improperly refused, but such juror is afterwar excused on a peremptory challenge, the judgment will not be reversed for su error, if an acceptable jury be impaneled before the defendant has exhausted h right to peremptory challenges. Erwin v. State, 29 O. S. 186; Mimms v. Stat 16 O. S. 221.

Where, on the trial of a criminal prosecution, a juror is challenged for cau by the accused, and the challenge is erroneously refused, and the juror is th peremptorily challenged, if the accused exhaust his peremptory challenges befo the jury is completed, the error will be considered material and to the prejudi of the accused. Hartnett v. State, 42 O. S. 568.

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One who states on voir dire that he has formed an opinion, is prima facie ompetent. What must be made to appear to remove such incompetency. McHugh State, 38 O. S. 155.

The court may discharge jurors in attendance on grounds of personal excuse upon their unsworn statements. Bond v. State, 23 O. S. 349.

Challenge for cause can be made only before the jury is sworn. Where no uiry is made on the subject until after the verdict, the existence of such cause challenge, though previously unknown to the defendant and his counsel, will necessarily entitle him to a new trial. Beck v. State, 20 O. S. 228.

Jurymen need not be sworn upon their voir dire in a criminal case until chal-ged for cause. Young v. State, 6 C. C. (N.S.) 53, 16 O. C. D. 747 (affirmed, hout report, 73 O. S. 372).

In a voir dire examination of veniremen to qualify them as fair and impartial ors under the constitution and the law, such examination, where not specifically trolled by statute, is largely in the discretion of the trial judge, and no prejudicial or can be assigned in connection with such examination unless there be a clear se of such discretion. State v. Ellis, 98 O. S. 21.

. 13655. Each defendant allowed peremptory challenges.

If two or more persons are put on trial at the same time, each must allowed his separate peremptory challenges. (R. S. § 7280; 66 v. , § 136.)

While a right exists under G. C. § 11436 to challenge the whole array of ors, such challenge must be made before the impaneling of the jury has begun. s v. State, 16 C. C. 31, 8 O. C. D. 442.

Where several defendants are put upon a joint trial, each must be allowed his rate peremptory challenges of jurors. Bixbe v. State, 6 O. 86.

Where several defendants are put upon trial at the same time, under the e indictment, the prosecuting attorney has but two (now four) peremptory lenges. Mahan v. State, 10 O. S. 233.

. 13656. Form of oath to jury.

When all challenges have been made, the following oath shall be ninistered: "You shall well and truly try, and true deliverance ke, between the State of Ohio and the prisoner at the bar (giving name): so help you God." (R. S. § 7281.)

. 13657. Affirmation.

A jury shall be allowed to make affirmation, and the words "this ı do as you shall answer under the pains and penalties of perjury," ll be substituted for the words "so help you God." (R. S. § 7282; v. 308, § 138.)

Where the statute required the oath to be administered to the jury in the owing form: "You shall well and truly try, and true deliverance make, between state of Ohio and the prisoner at the bar (giving his name), so help me God," the record shows that "the jury were sworn to well and truly try, and true verance make, between the state of Ohio and the prisoner at the bar," it will presumed that the statutory form was observed in administering the oath. reham v. State, 25 O. S. 601.

An objection that the jury was not properly sworn can not be considered on or, unless the bill of exceptions shows the form of the oath that was actually ninistered. Bartlett v. State, 28 O. S. 669.

When the record shows that the jury for the trial for a criminal case was duly rn to do the only thing required of its members by the statute, that is, to well truly try, and true deliverance make, between the state and the accused, the that the record does not contain the invocation, "so help me God," which rovided for at the conclusion of such oath, affords no ground of reversal. Kerr State, 36 O. S. 614.

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EVIDENCE.

Sec. 13658. Court may order view of place.

Whenever the court deems it proper for the jurors to have a view of the place at which a material fact occurred, it may order them to be conducted in a body, under the charge of the sheriff, to such place which shall be shown to them by a person appointed by the court. While the jurors are absent no person other than the sheriff and person so appointed shall speak to them on any subject connected with the trial. (R. S. § 7283; 66 v. 318, § 206.)

Absence of accused.—When an order is made by the court, on motion of the prosecuting attorney, that the jury view the premises where the alleged crime was committed, in charge of the sheriff and a person appointed by the court to point out the premises, it is error to permit such view in the absence of the accused and against his objection. Hotelling v. State, 3 C. C. 630; 2 O. C. D. 366.

On the facts shown in the record, it does not appear that the defendant was prevented from being present at the view of the premises where the shooting took place, made by the jury under the order of the court at the request of both parties; nor does the record show he was not present, and it is not claimed by the defendant or his counsel that he was not present. The claim of defendant being that he was in the custody of the sheriff, it must be conclusively presumed that he was prevented from attending the view. While it is the better practice to have the record show affirmatively that he was present, or that he refused to attend, if such was the case, the judgment should not be reversed if it does not so appear. Martin v. State, 17 C. C. 407; 9 O. C. D. 621.

Under § 7283, Revised Statues, providing for view by the jury of the premises in a criminal trial, the defendant may waive his privilege to accompany the jury, and it is not error to permit the jury to view the premises, in the absence of defendant, if he waives such right. Reighard v. State, 22 C. C. 340; 12 O. C. D. 382.

When the defendant in a criminal trial through his counsel makes a motion that the jury view the premises where the alleged crime occurred, which motion is granted, defendant himself participating in the discussion between counsel and the court in regard to the view, giving the number of his house, hearing the court instruct the jury as to what they would do and not do upon the view, and made no objection, nor asked to accompany them, and upon the return of the jury, his counsel in open court expressed himself as satisfied with the view, the defendant must be held to have waived his right to accompany the jury upon such view, if he had a strict legal right to accompany them. Reighard v. State, 22 C. C. 341; 12 O. C. D. 382.

Place, view of.—It is not error for the jury to make a view of the place where a felony is claimed to have been committed, under the order of the court and in charge of the sheriff, where the privilege is awarded the accused to accompany the jury, though he may refuse to attend the view. Blythe v. State, 47 O. S. 234.

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When the venue in a criminal cause has been changed, the court of common as sitting in the county to which the cause has been removed for trial, is horized by §§ 7264 and 7283, Revised Statutes, to send the jury, in a body, to county in which the crime was committed and the indictment found, to view the s criminis. Jones v. State, 51 O. S. 331.

Where, upon such view, counsel for the accused, and the prosecuting attorney, in presence of the jury, caused measurements to be made, objects to be placed near as possible in the relative positions they respectively occupied when the ged crime was committed, and made experiments illustrative of the manner in ch it may have been done, the accused being present, in the company of, and liberty to communicate freely with, his counsel, indicates no objection to, lissatisfaction with, such proceedings, should be deemed to have authorized the e, and a motion, made in his behalf, on the return of the jury into court, for discharge, on account of such proceedings, was properly overruled. Jones v. te, 51 O. S. 331.

If the trial court in a criminal proceeding, which is tried without the inter- tion of a jury, views the premises on his own motion after announcing in open t that he will do so, and the defendant does not object thereto, such action the part of the trial court is not reversible error. Even if such objection had made in time, the court would have the right to view the premises as a jury ht have done, either before or after the evidence was taken. Ames v. State, N. P. (N.S.) 385, 22 O. D. 92.

Where one of the parties to a civil action was allowed to talk with the jury to treat them with cigars and beer twice around, a new trial was granted. der v. Buehrer, 8 C. C. 244, 4 O. C. D. 507.

Entry—Order for jury to view place, etc.

(Title.) Indictment for ———.

It being proper, in the opinion of the court, for the jury to have a view of the e in which (any material fact) occurred, it is ordered that said jury be con- ed in a body, together with the defendant, under the charge of the sheriff, to said place; and that the same be shown to them by F G. And that they return orrow morning at 10 o'clock.

. 13659. Who competent to testify; husband and wife.

No person shall be disqualified as a witness in a criminal prosecu- by reason of his interest in the event thereof, as a party or other- e, or by reason of his conviction of crime. Husband and wife shall ompetent witnesses to testify in behalf of each other in all criminal secutions, and to testify against each other in all actions, prosecu- s, and proceedings for failure to provide for, neglect of, or cruelty their child or children under sixteen years of age. Such interest, viction or relationship may be shown for the purpose of affecting credibility of such witnesses. Husband or wife shall not testify cerning a communication made by one to the other, or act done by er in the presence of each other during coverture, unless the com-

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munication was made or act done in the known presence or hearin of a third person competent to be a witness, or in case of personal in jury by either the husband or wife to the other, or in case of th failure to provide for, or the neglect or cruelty of either to, thei children under sixteen years of age. The rule shall be the same if th marital relation has ceased to exist; but the presence or whereabout of the husband or wife shall not be construed to be an act under thi section. (R. S. § 7284; 100 v. 49; 91 v. 50; 86 v. 161; 66 v. 308, § 139.

Article 1, § 7, of the constitution of 1851, declares that no person shall b "incompetent to be a witness on account of his religious belief, but nothing herei shall be construed to dispense with oaths and affirmations."

No one is rendered incompetent to be a witness on account of religious belie nevertheless, every one offered as a witness in a court must take an oath or affirma tion before giving testimony. Clinton v. State, 33 O. S. 27.

A person who believes in the existence of a Supreme Being, who will, eithe in this life or the life to come, inflict punishment for false swearing, may be swor as a witness. Clinton v. State, 33 O. S. 27.

Interest in prosecution.—It is error for the court to refuse to permit th witness, after his testimony showing his complicity with the defendant in th commission of the crime, to be asked, on cross-examination, whether he did no expect that his own discharge from a further prosecution depended upon the fac of the conviction of the defendant. Allen v. State, 10 O. S. 287.

Where separate trials are awarded to parties jointly indicted, each is a com petent witness against the other. Brown v. State, 18 O. S. 496.

In criminal prosecutions the incompetency of a witness "by reason of hi interest in the event of the same as a party or otherwise," was removed in 186 by § 139 of the code of criminal procedure. Stern v. State, 20 O. S. 333.

On the trial of one charged with crime, a person jointly indicted with him wa called by the state and gave evidence tending to prove the guilt of the defendant o trial, which evidence was in conflict with former statements of the witness. Hel that the defendant may show, by cross-examination of such witness, that he ha been offered money and property and immunity from punishment, if he woul testify as he finally testified on behalf of the state; the fact that the offer wa made by one having no authority to make it, going to the weight and not th competency of the evidence. Tullis v. State, 39 O. S. 200.

Where two persons are jointly indicted for a felony, and one is on trial, declara tions of the other tending to establish the guilt of the one who is being tried, ar not competent to be submitted to the jury, unless it appears wih reasonable cer tainty that such declarations were heard by the one on trial. Aidt v. State 2 C. C. 18.

Conviction of crime.—Evidence can not be given to prove an infamous crim of which a witness has not been convicted, to impeach his credit. Webb v. State 29 O. S. 351.

A conviction which may be shown to affect the credibility of a witness, unde this action, is only as, independent of the section, would have rendered th convict incompetent to testify. The credibility of a witness can not be affecte by showing his former conviction of an offence under a city ordinance agains disorderly conduct. Coble v. State, 31 O. S. 100.

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Although, on cross-examination, the question: "How many times have you been ed," is admissible, an answer thereto can not be enforced, and, if voluntarily the state is bound by the answer. Coble v. State, 31 O. S. 100.

Where a convict is taken from the penitentiary to testify, it is competent ow that his reputation for truth and veracity was bad, at the time of and us to his conviction, at the place where he resided. Hamilton v. State, S. 82.

The limits of a cross-examination on matters not relevant to the issue for urpose of judging of the character and credit of a witness from his own tary admissions, rests in the sound discretion of the court trying the cause, he judgment will not be reversed unless it appears from the record that discretion has been abused to the prejudice of the party. Hanoff v. State, S. 178.

The plaintiff in error was indicted for murder, and on his trial gave testimony own behalf; on cross-examination by the state, he was asked if he had not been arrested for an assault with intent to kill, to which question he objected, he court overruled his objection; thereupon, without claiming his privilege, swered. Held, a matter within the discretion of the court. Hanoff v. State, S. 178.

The record of a former criminal proceeding which shows that a witness in resent case was indicted with others and pleaded guilty, that he was subse- ly given permission to withdraw such plea and that the proceeding against vas dismissed, does not show a conviction within the meaning of this section, vould accordingly of itself be inadmissible. Such record, however, may be d in evidence in connection with the cross-examination of such witness in he testified that he gave evidence in such case on behalf of the state against ther defendants. State v. Huffman, 86 O. S. 229.

Husband and wife.—Prior to the amendment of R. S. § 7284 in March, 1889 . L. 161), permitting husband and wife to testify in each other's behalf in nal cases, neither was a competent witness against the other. Neither § 139, code of criminal procedure, nor §§ 310 et seq. of the code of civil procedure, red them competent in criminal cases. Steen v. State, 20 O. S. 333; Schultz te, 32 O. S. 276.

To the general rule that husband and wife are not competent witnesses for ainst each other in a criminal prosecution, an exception prevails where either usband or wife is on trial for a personal injury inflicted on the other, and ch cases the party injured is a competent witness against the other. Whipp, v. State, 34 O. S. 87.

Before this section was placed in its present form, a wife was not a competent ss to testify on behalf of the state and against her husband on the trial e latter upon an indictment under G. C. § 13008, charging him with unlaw- neglecting and refusing to provide for his minor children. State v. Orth, S. 130.

When the husband or wife of a person charged with and on trial for crime lled as a witness by such person under the provisions of § 7284, Revised tes, to testify on his or her behalf, and is so examined, such witness occupies same position that any other competent witness does, and may be cross- ined by the prosecuting attorney in the same manner as might have been if he or she had not been the husband or wife of the person on trial, except as to confidential communications or acts as pointed out in the statute. rty v. State, 8 C. C. 262, 4 O. C. D. 462.

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Letters from husband to wife strongly tending to prove marriage relatio between them, when produced at the trial by a third party, not their agent, o representative, to whom they had been given by the wife, will not be privilege under the statute, but are competent evidence against the husband. Whalen v State, 12 C. C. 585, 5 O. C. D. 488.

Where the woman with whom the defendant was living as his wife, at th time of the commission of the crime, is shown to have been previously marrie to another man who was still living and from whom she had not been divorced, it i competent for the state to call her as a witness against the defendant. Lync v. State, 5 O. A. R. 16, 23 C. C. (N.S.) 230.

If the accused claims that a woman whom the state offers as a witness agains him is his wife, the burden of proving the existence of a valid marriage is upo the accused; and if the evidence of the woman tends to show that she was mar ried to another man before she went through an attempted ceremony of marriag with the accused, and that she was not divorced from her first husband, her evi dence is admissible. Lynch v. State, 5 O. A. R. 16, 23 C. C. (N.S.) 230.

The common-law rule has not been so far abrogated in Ohio as to permit first wife to testify against her husband who has married another woman and i on trial for bigamy. State v. Bates, 4 N. P. (N.S.) 502, 17 O. D. 301.

Sec. 13660. State's witness incriminating himself exempt from prose cution.

If a person called to testify on behalf of the state before a justic of the peace, grand jury or court, upon complaint, information, affi davit or indictment, discloses a fact tending to incriminate himself a to a misdemeanor hereinafter named, he shall be discharged from lia bility for prosecution or punishment for such offense, viz:

1. Keeping, or being the owner who rents a room, building, arbor booth, shed or tenement, or canal boat or other water-craft to be used or occupied for gambling, or knowingly permitting it to be so used o occupied;

2. Permitting a game to be played for gain upon or by means of a gaming device or machine in his house, or in an out-house, booth, arbo or erection of which he has the care or possession;

3. Keeping or exhibiting for gain or to gain money or other prop erty, a gaming table, faro or keno bank, or a gaming device or machine or keeping or exhibiting a billiard table for the purpose of gambling or permitting it to be so used;

4. Engaging in gambling for a livelihood or being without a fixed residence and in the habit of gambling;

5. Keeping a "bucket-shop" as defined by law, or gambling in stocks, bonds, petroleum, cotton, grain, provisions or other produce, or permitting such acts in his house, building or an outhouse, booth, arbor or erection of which he has the care and possession;

6. Keeping a tavern or other house of public resort and permitting a game for a wager to be played therein, or in a house, building or erection appended thereto, or playing a game therein or other public

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e, for wager, or betting or wagering on the hands or sides of per-
so playing;

. Being a minor and entering a saloon, beer-garden, or other place
re intoxicating liquor is sold or offered for sale, except in the dis-
ge of some lawful business or accompanied by a parent or
dian;

. Keeping or having charge of a saloon, beer-garden, or place
re intoxicating liquor is sold, and knowingly permitting a minor
than eighteen years of age, except a member of his family, to enter
remain therein, unless such minor is in the discharge of some law-
business or accompanied by a member of his family;

. Offenses arising from the laws prohibiting the selling, furnish-
or giving away of intoxicating liquors as a beverage. (R. S. § 7285;
. 153, § 13; 66 v. 318, § 207; 91 v. 80; 97 v. 332; S. & C. 666, 1435.)

A witness is not bound to answer any question that will directly or indirectly
nate himself, and he has the right to determine for himself whether the answer
have that effect. Warner v. Lucas, 10 O. 336.

Inasmuch as the witness, and not the court, is the judge as to whether the
er to a question would incriminate him, the court is without jurisdiction
mmit him for contempt in refusing to answer; but a witness who does not
n good faith in giving such a reason for refusing to answer may be subjected
e penalties for perjury. In re Sutter, 13 C. C. (N.S.) 69 (affirmed, 80 O. S.

13661. The defendant may testify.

On the trial of indictments, complaints, and other proceedings
nst a person charged with an offense, such person at his own re-
t shall be a competent witness. The neglect or refusal of such per-
to testify shall not create a presumption against him, nor shall
rence be made to, nor comment made upon such neglect or refusal.
S. § 7286; 66 v. 308, § 140; S. & S. 613.)

See Art. I, § 10, of the Ohio constitution.

Defendant as witness.—Where the accused in a criminal trial becomes a
ess in his own behalf, he can not be compelled, on cross-examination, to dis-
the confidential communications between himself and his attorney; nor can
disclosures be required of the attorney without the consent of the accused. It
e privilege of the accused to have such communications protected from com-
ry disclosure, and the privilege is not waived by his becoming a witness.
enhofer v. State, 34 O. S. 91; Benedict v. State, 44 O. S. 679.

Where upon a trial of an indictment the defendant offers himself as a witness,
testifies in his own behalf, he thereby subjects himself to the same rules, and
be called on to submit to the same tests as to his credibility as may legally
pplied to other witnesses. Hanoff v. State, 37 O. S. 178.

Where the prisoner voluntarily goes on the stand, and is sworn and examined
witness in his own behalf, under the statute, on his examination before a magis-
on such charge, and he is cautioned by the magistrate, before testifying, that

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he need not say anything to incriminate himself, a confession made in such testimor may be proved against him on a subsequent trial. Jackson v. State, 39 O. S. 37.

The accused having given evidence in his own behalf may, on cross-examinatic be questioned as to a different story by him told to police officers after his arres Riolo v. State, 19 C. C. (N.S.) 248.

Rights of the accused under state and federal constitution.—Wher during the examination of the prosecuting witness, the accused, at the request the prosecuting attorney, was ordered by the court to stand up and turn his bac to the witness, over the objection and exception of his counsel, that she might th better be able to identify him, and thereupon the prosecuting witness testified tha the party that assaulted her was a short man like the accused. *Held*, that th action of the court was not a violation of the right of the accused under § 10 of th bill of rights of the constitution of Ohio or of the fifth amendment of the constitu tion of the United States which provides that no person be compelled, in any crim inal case, to be a witness against herself. Coles v. State, 13-23 O. C. C. 313.

Refusal of accused to testify—Reference in argument.—Where a de fendant, on trial under indictment for crime, forbears to testify as a witness i his own behalf, and the evidence having been closed, and the counsel for the stat being engaged in the argument of the case to the jury upon what he claimed to b matter of fact, interrupts the counsel by a contradictory statement of fact, in th hearing of the jury, and the counsel thereupon says to the defendant, "You ha an opportunity to testify in this case, and did not do so," and it not appearing tha the court was in any way derelict in duty in the premises, such occurrence doe not constitute good cause for granting a new trial. Calkins v. State, 18 O. S. 36

Where a prosecuting attorney in his argument to the jury, in commenting o confessions, claimed to have been made by the defendant, who was not examined a a witness in the case, made use of this language: "He admits that he was preser when she was killed; of course he does not say he killed his mother; he did no get on the stand and say he killed her; he did not tell any one that he killed hi mother; he says that the two robbers killed her, and that he stood by and saw ther do it. Is this a reasonable story? This is not such misconduct of the prosecutin attorney, as would require the trial court to set aside the verdict and grant a ne trial. No statement having been made to the jury, as to the right of the defendan to testify, or any comment made on his refusal to do so, and it not appearing tha the defendant was in any way prejudiced thereby, it rests in the sound and lega discretion of the trial court. Schneider v. State, 2 C. C. 420; 1 O. C. D. 565.

Where a person is present in court, competent to testify, and it appears that i the claim of a party omitting to call such person as a witness was correct, it coul be established by such person, the failure to call him, if not adversely interested o biased, may properly be commented upon by the opposing counsel in his argumen to the jury. And arguments so made to the jury on the evidence by the counsel fo the state, that the defendant at the time of her arrest and up to the trial, at n time had denied her guilt when accused, or attempted to explain any circumstance of suspicion against her, if such argument does not fairly refer to the fact that sh had a right to testify in the case, and that her failure to do so, raised a presump tion that she was guilty, is not such misconduct of the prosecuting attorney, o violation of § 7286 of the Revised Statutes, as to require that a new trial b awarded. McGuire v. State, 3 C. C. 551; 2 O. C. D. 318.

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he remark by a prosecuting attorney in his argument to the jury with ref- to a certain statement that the "defense had an opportunity to deny it, t stands uncontradicted," is not such misconduct as necessitates the setting of a verdict of guilty, where the remark was immediately withdrawn by peaker and the jury were instructed by the court to disregard it. Diegle v. 14 C. C. (N.S.) 289, 23 O. C. D. 82 (affirming State v. Diegle, 11 N. P. (N.S.) 1 O. D. 557; affirmed, 86 O. S. 310).

case is pending in the common pleas court, within the meaning of the gen- chedule to the amendments of 1912 to the constitution of Ohio, when there l in that court a transcript of the criminal docket of the examining magistrate om the accused has been committed to the jail of the county, or recognized pear before that court to answer the charge in the affidavit filed with such trate. State v. Morrow, 90 O. S. 202.

he case of one arrested and examined before a justice of the peace in December, the transcript of which proceedings was filed in the common pleas court before d of that month, was pending prior to January 1, 1913, and falls within the provision of the constitutional amendment which permits the prosecuting ey to comment upon the fact that the accused failed to take the stand in n behalf and the court to make reference thereto in the charge to the jury. w v. State, 1 O. A. R. 95, 15 C. C. (N.S.) 561, 24 O. C. D. 140.

efusal to testify—Charge.—It is not error where the defendant in a crim- ase fails to take the stand and testify, to charge the jury that such failure no presumption of guilt against him. Sullivan v. State, 9 C. C. 652; 4 O. 451.

§ 7286, Revised Statutes (G. C. 13661), which makes the person accused petent witness on the trial of an indictment at his own request, but not other- he provision, "but his neglect or refusal to testify shall not create any pre- ion against him, nor shall any reference be made to, or any comment be made such neglect or refusal," is intended to give full effect to his immunity from ligations to furnish evidence against himself because of his silence, and the ice thereto which is forbidden is such as would suggest or encourage an in- e of that character. Tate *et al* v. State, 76 O. S. 537.

pon such trial an instruction to the jury that the failure of the accused to does not relieve the state from the obligation to produce evidence which will ish guilt beyond a reasonable doubt is not an error for which a judgment ing a verdict of guilty should be reversed. Tate *et al* v. State, 76 O. S. 537.

is not error for the court, *sui sponte*, to charge the jury that: "The fact he defendant has not gone upon the witness stand and testified, does not ex- he state from the full measure of proof to which I have called your attention, is the privilege of the defendant either to testify in his own behalf or to de- o do so, resting his denial of the offense solely upon his plea of "Not guilty." v. State, 9 C. C. N. S. 287; 19 O. C. D. 410.

declaration by the prosecuting attorney in his argument to the jury that a n matter, if true, might easily have been proved by calling the defendant vitness, is ground for granting a new trial, where the court failed to caution ry that such statement was improper and should not be considered by them. v. Hudson, 7 O. L. R. 502.

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Sec. 13662. Subpoenas for witnesses to issue to any county.

In all criminal cases, the clerk of the court of the county, upon precipe being filed, shall issue writs of subpoena for the witnesse named therein, directed to the sheriff of such county or the count where such witnesses reside or are found, which shall be served and r turned as in other cases. Such sheriff, by writing indorsed on th writs, may depute a disinterested person to serve and return them provided, that the number of witnesses who are expected to testify u on character or reputation, for which subpoenas are issued, shall b designated upon the precipe, and shall not exceed ten upon each sid unless a deposit is first made with such clerk of at least one per die and mileage fee for each of such additional witnesses except in th case of murder in the first or second degree, manslaughter, rap assault with intent to commit rape, or selling intoxicating liquor t a person in the habit of becoming intoxicated. Not more than te witnesses upon each side shall be permitted to testify upon the que tion of character or reputation in a criminal case, except as herei provided, unless his full per diem and mileage fee has been so deposite or paid by the party in whose behalf he is sworn, and such clerk sha not issue a certificate for compensation to be paid out of the count treasury to a witness in addition to such number who has testifie upon the subject of character or reputation, except as above provide (R. S. § 7287; 86 v. 77; 66 v. 308, § 141; S. & C. 1184.)

While the provisions of § 7287, Revised Statutes, limiting to ten the number witnesses who may be examined as to character and reputation on the trial of an criminal case, other than those for offenses specially excepted by said sectio unless the payment of the fees of those in excess of ten is provided for by the part calling them, according to the provisions of the section, is constitutional and valid yet it is directory only, and the action of the court of common pleas in refusing t enforce the statute in this respect is not subject to review by this court on erro State v. Stout, 49 O. S. 270.

Cited as to limiting the number of witnesses and the abuse of not so doing Hupp v. Boring, 8 C. C. 259, 261, 4 O. C. D. 560.

Sec. 13663. When return shall be verified by oath.

If the subpoena be served by a person so deputized, he shall retur thereon the manner in which it was served, and make oath to the trut of such return before a person competent to administer oaths, whic shall be indorsed on the writs. Such subpoena shall be returned ac cording to the command thereof, by the person serving it through th postoffice or otherwise. (R. S. § 7288; 66 v. 308, § 142; S. & C. 1184.

Sec. 13664. How attendance of witnesses shall be enforced, etc.

Except as otherwise provided, the code of civil procedure relativ to compelling the attendance and testimony of witnesses, their exam

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ation, the administering of oaths and affirmations and proceedings contempt to enforce the remedies and protect the rights of parties, all extend to criminal cases, so far as applicable. (R. S. § 7289; 66 308, § 143.)

The transcript of the evidence given by witnesses at a former trial of the ne defendant in the same criminal proceeding, as to the good character and reputation of a certain witness for truth and veracity is not admissible if it is shown that such witnesses are dead or are absent through the connivance by the procurement of defendant even if they are outside the state and the te is accordingly unable to obtain their evidence. State v. Huffman, 86 O. S. 229.

This section does not mention the competency of witnesses or their testimony, l does not extend the rules of civil procedure to either. Therefore evidence of testimony delivered in a previous trial of the same case by a witness not d, but beyond the jurisdiction of the court, or limits of the state, is not admis- le unless it appear to the satisfaction of the trial court, that the witness is ent through the connivance, or by the procurement of the accused. State v. ng, 66 O. S. 407.

Witnesses in Ohio are of one class; and an expert may be punished for contempt refusing to give his opinion unless paid an additional fee. State, ex rel., v. rby, 9 Dec. Rep. 725, 17 Bull. 62.

One who disregards the subpoena of a police court may be punished for con- npt. Woods v. State, 11 Dec. Rep. 888, 30 Bull. 290.

c. 13665. Subpoena may issue to keeper of prison to produce witness.

When it is necessary to procure the testimony of a person impris- ed in the penitentiary, a workhouse or prison, on the trial of an ue upon an indictment, or upon a hearing before a grand jury, the urt or a judge in vacation may order a subpoena to be issued, directed the warden of such penitentiary or superintendent or keeper of such rkhouse or prison, commanding him to bring the person named erein before the court. (R. S. § 7290; 70 v. 78, § 1.)

The following joint resolution was adopted by the general assembly of the state Ohio on March 11, 1887 (84 v. 446):

"A resolution relative to bringing prisoners from other states to Ohio to testify.

"Be it resolved by the general assembly of the state of Ohio, that the governor the state of Ohio, upon the written request of the prosecuting attorney of any nty of this state, representing that any person held in confinement, under tence in the penitentiary, or other penal institution of any other state, is a terial witness for the state of Ohio, in any criminal cause pending in such county, which the crime charged is a felony, is hereby authorized to make a request upon proper officers of such penal institution, in which such person is confined, asking t such person be brought into such county, in this state to testify in behalf of state of Ohio, which request shall be accompanied by a certified copy of the visions of the statutes of Ohio, protecting such person from discharge."

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Sec. 13666. Keeper to take witness before court.

The warden, superintendent or keeper, upon receiving such sub poena, shall take such witness, or cause him to be taken before suc court, at the time and place named in such subpoena, and hold hin until he is discharged by the court. When so discharged, he shall b returned, in the custody of such officer, to the place of imprisonment from which he was taken and the officer may command such assistanc as he deems proper for the transportation of such witness. (R. S § 7291; 70 v. 79, § 2.)

When a subpoena has been issued for a convict, it is the warden's duty to tak such convict before the court issuing the subpoena or cause him to be so take State, ex rel., v. Coffin, 56 O. S. 241.

Sec. 13667. Witness may be placed in jail; how costs paid.

When such witness is in attendance upon a court, he may be place in the jail of the county. The expenses of the officer in transportin him to and from such court, including compensation for the guard o attendant of such prisoner not exceeding the per diem salary of suc guard for the time he is kept from the penitentiary, shall be allowe by the court and taxed and paid as other costs against the state. (R S. § 7292; 93 v. 224; 70 v. 79, §§ 3, 4.)

See State, ex rel., v. Coffin, 56 O. S. 241.

Sec. 13668. Deposition of witnesses for defendant taken when.

When an issue of fact is joined upon an indictment and materi witness for the defendant or for the state resides out of the state, o residing within the state, is sick or infirm or about to leave the stat or is confined in prison, such defendant or the prosecuting attorne may apply in writing, to the court or the judge thereof in vacatio for a commission to take the deposition of such witness or witnesse Such commission shall not be granted and said order shall not be mad until there is filed with the clerk of said court an affidavit stating i substance the evidence sought to be secured by deposition, and th it is competent, relevant and material and that the defendant is n confined in prison or, if confined in prison, that the deposition is n to be taken outside of the state of Ohio. If it appear to the court, judge, upon such application supported by said affidavit that the ev dence sought to be secured by deposition is relevant, competent an material, and that the defendant is not confined in prison, or, if co fined in prison, that the deposition is not to be taken outside of th state of Ohio, the court or judge shall grant such commission an make an order stating in what manner and for what length of tim

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ice shall be given to the prosecuting attorney or to the defendant ore such witness or witnesses shall be examined. (R. S. § 7293; v. 145, § 144; 103 v. 443; 107 v. 451.)

In the absence of a satisfactory showing as to the materiality of the testimony red for use in a criminal case, it is not error to overrule an application for an r to take testimony in a distant country, where the expense to the state if order were granted would amount to as much as two thousand dollars. Neisder v. State, 26 C. C. (N.S.) 247.

In a criminal, as in a civil case, an application for the postponement of the l to a subsequent term, is addressed to the discretion of the court. And in a inal case, where such motion is made on behalf of the accused to enable him procure the attendance or the deposition of a witness who resides out of the e, and whose testimony he has not been able to obtain, it is not error for the t to require the applicant to set out in his affidavit, filed in support of the ion, the facts he expects to prove by such witness; or to refuse to grant the ion in case the prosecution elects to admit upon the trial that the witness ed would so testify, and to treat the statement of facts so set out as his deposi-. Comerford v. State, 23 O. S. 599.

Where, in such case, the prosecutor was permitted, on the argument of the case he jury, against the objection of the accused, to comment upon such affidavit, to read the whole of it to the jury. Held, that this was not error to the udice of the accused, the affidavit showing nothing to his prejudice, and the re of the comments made by the prosecutor not being shown. Comerford v. te, 23 O. S. 599.

Application for commission to take depositions.

(Title.) Indictment for ———.

The petition of E F, the defendant, respectfully represents that an indictment ending against him in the court of common pleas of ——— county, in which he harged with the offense of ———. That one ———, who resides at ——— he state of ——— (or if he resides in this state, that he is sick, or is about eave the state) is a material witness for this defendant, and he therefore prays a commission may be issued to N M to examine the said ——— upon interatories.

Entry—Commission to take testimony.

(Title.) Indictment for ———.

On application of the defendant, by his counsel, and it appearing that G F is aterial witness in his behalf, and that he now resides in Lexington, Kentucky, court hereby appoints the mayor of Lexington a special commissioner to take testimony of said G F, upon interrogatories and cross-interrogatories on file, ome convenient place in said city, on or before the ——— day of ———, A. D. -, and return the same to this court duly certified.

And it is ordered that notice of this order be given to the prosecuting attorney — days before such examination.

Commission to take depositions.

State of Ohio, ——— county, ss.

Be it known that the court of common pleas of ——— county, Ohio, does hereby horize and commission you to examine on oath ———, upon interrogatories cross-interrogatories hereto annexed and reduce said examination to writing

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and cause the same to be subscribed by said witness or witnesses in your presen and to certify, seal up and transmit the same to the clerk of this court withou unnecessary delay.

In witness whereof, I have hereunto set my hand and affixed the seal of sa court at ———, Ohio, this ——— day of ———, 19—.

———,
Clerk of the Common Pleas Court, ——— County, Ohi

Sec. 13668-1. When defendant may be taken to place of taking depo sition; expenses.

When the deposition is to be taken in the state of Ohio and suc commission is granted, and the defendant is confined in prison, th sheriff or deputy shall be ordered by the court or judge to take th defendant to the place of the taking of such deposition and have hi before the officer at the taking of such deposition. Such sheriff o deputy shall be reimbursed for actual reasonable traveling expense for himself and the defendant, so incurred, the bills for the sam upon approval by the county commissioners, to be paid from the count treasury on the warrant of the county auditor. Such sheriff shall r ceive as fees therefor one dollar for each day in attendance therea Such fees and traveling expenses shall be taxed and collected as othe fees and costs in the case. (103 v. 443; 107 v. 452.)

Sec. 13668-2. Counsel appointed shall represent the defendant.

If counsel has been appointed by the state to defend a defenda under sections 13617 and 13618, General Code, said counsel shall b authorized to attend upon and represent the defendant at the takin of depositions, and said counsel shall be paid a reasonable fee for h services in such matter, in addition to the fee prescribed in sectio 13618, General Code, to be fixed by the county commissioners; and h shall also be allowed his actual expenses incurred in going to an from the place of taking the depositions. (103 v. 444.)

Sec. 13668-3. Right of accused to attend in person and examine wi nesses face to face.

In all cases in which depositions are taken by the accused or b the state, to be used by or against the accused, of any witness whos attendance cannot be had at the trial, the court shall by proper orde provide and secure to the accused the means and opportunity to b present in person and with counsel at the taking of such depositio and to examine the witness face to face as fully and in the same ma ner as if in court; and any and all expenses necessarily incurred i the securing of said means and opportunity and the expenses of th prosecuting attorney in attending the act shall be paid out of th

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nty treasury as other county expenses, upon the certificate of the rt making such order. (103 v. 444.)

y ordering the sheriff to take the defendant to the place of taking depositions.

(Title.) This court having heretofore granted a commission to take the depo-ns of A B and C D, witnesses for the state (or witnesses for the defense as case may be), the sheriff of ——— county, or his duly appointed deputy, is by ordered securely to take the defendant E F to the place of the taking of deposition and have the said defendant before the officer at the time and place he taking of said deposition and thereafter immediately return him to the of this county.

13669. How examination shall be conducted, etc.

The examination of such witness shall be taken and certified, and return thereof to the court made as for taking depositions in civil s. The commissioners so appointed shall receive such compensation he court of common pleas shall direct to be paid out of the county sury and taxed as part of the costs in the case. (R. S. § 7294; 66 09, § 145.)

Certificate by commissioner.

State of ———, ——— county, ss.

I, ———, do hereby certify that in pursuance of the commission hereto annexed to me directed, on the ——— day of ———, 19—, and from day to day there-r, at ———, said witnesses, ———, appeared before me and were then and e duly sworn according to law in said cause, and were then examined by me the interrogatories and cross-interrogatories annexed to the said commission said examination was reduced to writing by me and was subscribed by said wit-es in my presence, all of which is herewith returned.

In witness whereof, I have hereunto set my hand this ——— day of ———, .

———, Commissioner.

Endorsement on envelope.

(Title.)

Depositions in said cause sealed up, addressed and transmitted by me.

———, Commissioner.

———, clerk of the court of common pleas of ——— county, Ohio.

13670. Court may order discharge of defendant to give evidence for the state, etc.

When two or more persons are jointly indicted, before any of the used has gone into his defense, the court may direct one of such ac-ed to be discharged, that he may be a witness for the state. An used person when there is not sufficient evidence to put him upon defense, may be discharged by the court, or, if not so discharged, ll be entitled to the immediate verdict of the jury, for the purpose

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of giving evidence for others accused with him. Such order of discharge in either case shall be a bar to another prosecution for the same offense. (R. S. § 7295; 66 v. 309, § 146.)

It is not error in the court to refuse to give its opinion upon the weight of testimony, or to refuse to exclude from the jury evidence tending to prove the issue, but which is insufficient of itself for that purpose. Hummel v. State, 17 O. S. 628.

With regard to the practice of demurring to the evidence, it does not seem to be provided for or sanctioned by the criminal code. In such cases, instead of demurring, the better practice is to move the court to exclude the evidence, or to instruct the jury that it is insufficient. Baker v. State, 31 O. S. 314.

Entry—Prisoner discharged to become state's evidence.

(Title.) Indictment for ———.

It appearing to the court that the defendant, E F, is willing to become a witness for the state in the prosecution of his codefendant, upon being discharged therefrom himself, it is ordered that a *nolle prosequi* be, and the same is hereby, entered herein as to said E F.

Sec. 13671. Proof necessary in case of seduction or sexual intercourse with pupil.

In a trial for seduction under promise of marriage, or an indictment of a superintendent, tutor or teacher of a female in a school or other public institution, or instructor of a female in music, dancing, roller-skating, athletic exercises or a branch of learning, of sexual intercourse with her consent while under his instruction, a conviction shall not be had on the testimony of such female unsupported by other evidence to the extent required as to the principal witness in cases of perjury. (R. S. § 7296; 66 v. 309, § 147; 56 v. 158, § 1; 75 v. 142, § 1; S. & C. 452.)

For the crime of seduction under promise of marriage, see § 13026.

As to various questions of evidence in trials for seduction, see Bowers v. State, 29 O. S. 542.

Sec. 13672. Proof of carnal knowledge.

Carnal knowledge or sexual intercourse shall be deemed complete upon proof of penetration. (R. S. § 7297; 71 v. 14, § 1.)

Capacity.—The section in the code of criminal procedure, dispensing with proof of *emissio seminis*, has no relation to capacity; and hence, it does not so enlarge the meaning of the statutory provision in relation to rape, as to include persons not heretofore amenable to that provision. Hiltibiddle v. State, 35 O. S. 52.

Sodomy.—This section, as a rule of evidence, is applicable as well to prosecutions for sodomy as to those for rape. Foster *et al.* v. State, 1 C. C. 467; 1 O. C. D. 261.

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Evidence.—In sexual crimes with consent including incest, other and similar lterous or licentious acts or conduct by the defendant toward the prosecutrix, ther prior or subsequent to the date of the specific act charged in the indict-t, are, if not too remote, admissible for the purpose of showing the adulterous ncestuous disposition of the defendant toward the prosecutrix and the illicit continuous sexual relations existing between them. State v. Reineke, 89 O. S. (distinguishing Rason v. State, 78 O. S. 449).

In a prosecution for rape, where the state has given evidence tending to prove the prosecuting witness had contracted a venereal disease from the defendant by on of his alleged forcible sexual intercourse with her, evidence that she had al intercourse with others than the defendant about the time of the alleged is admissible to show that the prosecuting witness might have contracted the ase from some person other than the defendant, but evidence that she tried ave sexual intercourse with other men or boys during that period is inadmis-for any purpose. Angeloff v. State, 91 O. S. 361.

13673. Proof in case of treason.

Unless he confesses his guilt in open court, a person shall not be victed of treason except by the testimony of two credible witnesses he same overt act laid in the indictment; or of misprison of treason setting on foot or providing the means for unauthorized military editions, except by the testimony of two credible witnesses. (R. S. 98; 66 v. 309, § 149; 58 v. 110, § 4; S. & S. 262.)

13674. What is prima facie evidence of embezzlement by public officer.

Failure or refusal to pay over, or produce the public money, or part eof, by an officer or other person charged with the collection, re-t, transfer, disbursement or safe-keeping of such money, or part eof, whether belonging to the state, or a county, township, mu-pal corporation or board of education in this state, or other public ey, or to account to, or make settlement with a legal authority, of official accounts of such officer or person, shall be prima facie evi-ce of the embezzlement thereof. Upon the trial of such officer or son for the embezzlement of public money under any provision of it shall be sufficient evidence, for the purpose of showing a bal-e against him, to produce a transcript from the books of the itor of state, auditor of the county or the records of the commis-ers of the county. The refusal of such officer or person, whether r out of office, to pay a draft, order or warrant drawn upon him an authorized officer, for public money in his hands, or a refusal a person or public officer to promptly pay over to his successor lic money or securities on the legal requirement of an authorized er of the state or county, on the trial of an indictment against

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him for embezzlement, shall be prima facie evidence thereof. (R. S. § 7299; 55 v. 44, § 15; S. & C. 1610.)

As to embezzlement and penalty therefor, see §§ 12873 et seq.

This section prescribes what shall be prima facie evidence of the crime embezzlement, but it does not affect the definition of the crime itself. State Cameron, 91 O. S. 50.

TRIAL.

Sec. 13675. Order of proceedings on trial.

After the jury is impaneled and sworn, the trial shall procee in the following order:

1. The counsel for the state must state the case of the prosec tion, and may briefly state the evidence by which he expects to su tain it;

2. The defendant or his counsel must then state his defense, ar may briefly state the evidence he expects to offer in support of it;

3. The state must first produce its evidence; and the defenda shall then produce his evidence;

4. The state will then be confined to rebutting evidence, unle the court, for good reasons, in furtherance of justice, permits it offer evidence in chief;

5. When the evidence is concluded, either party may request i structions to the jury on the points of law, which shall be given refused by the court; such instructions shall be reduced to writin if either party request it;

6. When the evidence is concluded, unless the case is submitt without argument, the counsel for the state shall commence, the d fendant or his counsel follow, and the counsel for the state conclu the argument to the jury;

7. The court, after the argument is concluded and before procee ing with other business, shall forthwith charge the jury; such charg or a charge given after the conclusion of the argument, shall be r duced to writing by the court, if either party request it before t argument to the jury is commenced. Such charge or charges, or oth charge or instruction provided for in this section, when so written ar given, shall not be orally qualified, modified or explained to the ju by the court. Written charges and instructions shall be taken by t jury in their retirement and returned with their verdict into court ar remain on file with the papers of the case. (R. S. § 7300; 66 309, § 151.)

Statement of prosecutor.—Where the counsel for the state in his openi statement, in good faith, refers to evidence which afterwards proves inadmissib

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the court overrules the defendant's objection to the same, it is not such an e of privilege on the part of counsel and discretion in the court as will titute a ground for reversal. Wray v. State, 5 C. C. (N.S.) 437, 17 O. C. D. 1.

A prejudicial remark of the prosecuting attorney made before the trial in the ence of certain jurors, such as a statement with reference to a witness who testified that he could not understand the questions so that an interpreter necessary, that such witness was a liar and had spoken good English to the ecuting attorney, furnishes no ground for excusing all the jurors. Taddeo v. e, 22 C. C. (N.S.) 281.

Evidence, production of.—When on the trial of a capital case, a witness nding court under subpoena on behalf of the state departs without leave, it is petent for the court to suspend the progress of the trial for the purpose of rcing the attendance of the witnesses by attachment. The time to be allowed the discretion of the court. Where there is no reason to believe that the ndant has been prejudiced, a delay of three days will not necessarily invalidate verdict. Griffin v. State, 18 O. S. 438.

In the trial of a cause, the allowing of evidence to be introduced out of its r rests in the sound discretion of the court. The remedy for the abuse of such etion is by motion for a new trial; and if reviewable on error at all, it is only n taken in connection with all the evidence in the case it is shown to have ented the party from having a fair trial. Webb v. State, 29 O. S. 351.

The order prescribed in this section for the introduction of evidence, although tory merely, should be followed; but if the court permits evidence in chief e given on the part of the state, on cross-examination of the witnesses for the ndant the judgment will not be reversed unless the defendant was deprived of r trial. Adams v. State, 25 O. S. 584.

In the trial of a criminal case, evidence of the testimony delivered in a ious trial of the same case by a witness not dead, but beyond the jurisdiction e court, or limits of the state, is not admissible unless it appear to the satis- on of the trial court, that the witness is absent through the connivance, or he procurement of the accused. State v. Wing, 66 O. S. 407.

In such case, when the proof of the death is direct and positive, if the circum- ces shown are of such force when taken together as to leave no room for doubt the deceased was murdered, any extra-judicial confession by the prisoner, if rwise competent, may be admitted in evidence for the purpose of establishing connection with the crime. State v. Knapp, 70 O. S. 380.

If the facts extrinsically proved by the state corroborate the confession, then direct and positive evidence of the corpus delicti is not indispensable to admit confession in evidence; and if such extrinsic corroborative facts, when con- ed with the confession, persuade the jury beyond a reasonable doubt of the oner's guilt as charged, such evidence will support a verdict of guilty. Blackburn tate, 23 Ohio St. 146, approved and followed. State v. Knapp, 70 O. S. 380.

Where the prisoner has made a written confession admitting that he has perpe- ed the crime charged in the indictment and other crimes, and the whole of the ession is offered by the state and is objected to on the part of the defendant, not error to allow the whole confession to go to the jury when the court he time instructs the jury that it is admitted only to prove the killing of the on named in the indictment, and that they should disregard any portion of the ession which does not relate to such killing; and further that they should not nit the statements in the confession to prejudice them against the defendant

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for the reason that they were only trying him on the charge of killing all in the indictment. State v. Knapp, 70 O. S. 380.

Where the accused has made a written confession, under oath in which admits the killing charged in the indictment against him and the confession cont admissions of other murders, the action of the court in permitting the jury to the confessions with them in their room while considering upon their verdict is prejudicial error. State v. Knapp, 70 O. S. 380.

Where a person conducts a private interview with one who afterward called and examined as a witness before the grand jury, which found an indictm against the defendant concerning some matters disclosed in said interview, w interview was stenographically taken, written out and subsequently delivered the prosecuting attorney for his use, and on the trial the person interviewe called, and testified for the state in support of the indictment, it is error for court, on request of defendant, to order the prosecuting attorney to deliver transcript of said interview to defendant or his counsel, or to order the prosecu attorney to allow either of them an inspection of the same. State v. Rho 81 O. S. 397.

A person charged with crime is not entitled, before, or at the time of t to the minutes of the evidence taken before the grand jury, on which the in ment was found against him, nor to an inspection of a transcript of such evide and it is error for the court to order the prosecuting attorney to deliver minutes, or a transcript of said evidence so taken, to the defendant or his cou or to order the prosecuting attorney to permit either of them to make an inspec thereof. State v. Rhoads, 81 O. S. 397.

Where a person is on trial for manslaughter, by running an automobile business and closely built up portion of a municipality at a greater rate of s than is permitted by G. C. § 12604, it is not competent to prove such fact by ordinance of the municipality defining what are the business and closely built portions thereof (G. C. § 12608). State v. Horn, 85 O. S. 430.

On cross-examination the court may permit a witness to be asked whethe had not testified on behalf of the state in another criminal proceeding, in w such witness had been indicted with others and had pleaded guilty, but in w he had subsequently been permitted to withdraw his plea and which procee against him had been dismissed. State v. Huffman, 86 O. S. 229.

Evidence which tends to show a conspiracy on the part of the defendant others to fabricate a defense to an indictment for bribery, is competent in c The fact that such evidence is of a circumstantial nature and not direct, not render it incompetent, where it otherwise conforms to the established r of evidence in cases of conspiracy. State v. Huffman, 86 O. S. 229.

The transcript of the evidence given by witnesses at a former trial of same defendant in the same criminal proceeding, as to the good character and reputation of a certain witness for truth and veracity is not admissible if i not shown that such witnesses are dead or are absent through the conniv or by the procurement of defendant even if they are outside of the state and state is accordingly unable to obtain their evidence. State v. Huffman, 86 O. S.

The record of a former criminal proceeding which shows that a witness in present case was indicted with others and pleaded guilty, that he was subsequ given permission to withdraw such plea and that the proceeding against him dismissed, does not show a conviction within the meaning of this section, would accordingly of itself be inadmissible. Such record, however, may be off

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vidence in connection with the cross-examination of such witness in which he ified that he gave evidence in such case on behalf of the state against the other ndants. State v. Huffman, 86 O. S. 229.

The admission of incompetent evidence in a criminal proceeding is not reversible r if the guilt of the accused is established to a moral certainty, excluding such ence. State v. Reineke, 89 O. S. 390.

The doctrine of res gestae applies equally to participants, bystanders and ons incompetent to be witnesses. State v. Lasecki, 90 O. S. 10.

The doctrine of res gestae, as applied to exclamations, should have its limits rmined, not by the strict meaning of the word "contemporaneous," but rather he causal, logical or psychological relation of such exclamations with the pri- y facts in controversy. State v. Lasecki, 90 O. S. 10.

Where the question put to a witness is competent, or not objected to by counsel, the witness answers, a part of which answer is competent and a part incom- nt, a general objection to the whole answer is properly overruled, even though e be some objectionable matter in the answer. To save the objector's rights hould clearly indicate the part of the answer to which he objects and move its ision. If the court overrules such motion, he should then save his exception. e v. Lasecki, 90 O. S. 10.

The exclamation of a boy four years of age that "the bums killed pa with a m-stick," which was made from ten to thirty seconds after a fatal assault his father, made in the boy's presence, is competent evidence to go to the as explanatory and illustrative of the manner and means by which the father assaulted. The utterance of the boy under such circumstances made at the est opportunity to make an outcry in the presence and hearing of others, was spontaneous and impulsive language of the situation, free from any subterfuge, ice or motive to fabricate. Its weight, however, is purely a question for the . State v. Lasecki, 90 O. S. 10.

If the evidence leaves it in doubt as to whether the accused was charged by deceased with having shot her, or whether such charge was made by the her of the deceased in the presence of the accused and the deceased, such ence is admissible; since it is for the jury to determine whether or not the sed understood that such charge was made by the deceased, and to determine ther or not it would have been natural for the accused, if innocent, to have ed such charge. Hoover v. State, 91 O. S. 41 (State v. Hoover affirmed the t of appeals, which affirmed 17 N. P. (N.S.) 65, 24 O. D. 212).

Testimony of an expert witness in which he gives an opinion with reference state of facts contained in an hypothetical question may be impeached by imony that at another time he had given another opinion concerning the same e of facts. Hoover v. State, 91 O. S. 41.

If an expert witness is also the attending physician, and he gives his opinion d upon his personal knowledge, the state may show in a criminal case that witness had made contradictory statements at other times as to his opinion erning the same state of facts, knowledge of which he had acquired in such ner. Hoover v. State, 91 O. S. 41.

The testimony of an expert witness, in which he gives an opinion with ref- ce to a state of facts contained in an hypothetical question, can not be im- hed by testimony that at a different time he had expressed an opinion as to actual transaction which was different from his expert opinion on the state facts contained in the question; since his belief as to the actual facts may

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differ materially from the facts set forth in such hypothetical question. Hoover State. 91 O. S. 41.

Where evidence of former offenses is properly admitted to prove intent, it the duty of the trial court, at the time such evidence is offered, to instruct the ju the purpose for which it is admitted. Baxter v. State, 91 O. S. 167.

While evidence of other offenses is competent for the purpose of showing inte if criminal intent is a specific element of the crime charged, such evidence is of very dangerous character, and should be admitted with great caution. Baxter State, 91 O. S. 167.

While in a prosecution for embezzlement, the state may show that the accus was in possession of a large sum of money immediately following the embezz ment, and may thus put upon the accused the burden of explaining the source fr which he received such money, the counsel for the state can not frame his questic so as to suggest that the brother of the accused has been charged with embezz ment, and that the money taken by the accused was taken for the purpose enabling his brother to return the money embezzled by him. It is improper permit such questions to be asked without reference to the answers given in respor thereto. Baxter v. State, 91 O. S. 167.

Where a defendant while confined in jail submits without objection to physical examination of his person, with knowledge that such examination is f the purpose of proving or disproving his guilt of the crime charged, evidence the result of such examination may be admitted in evidence upon the trial. Angel v. State, 91 O. S. 361.

In a prosecution for rape, where the state has given evidence tending to pro that the prosecuting witness had contracted a venereal disease from the defenda by reason of his alleged forcible sexual intercourse with her, evidence that she h sexual intercourse with others than the defendant about the time of the alleg rape is admissible to show that the prosecuting witness might have contracted t disease from some person other than the defendant, but evidence that she tried have sexual intercourse with other men or boys during that period is inadmissil for any purpose. Angeloff v. State, 91 O. S. 361.

In the trial of an accused upon an indictment charging the obtaining of mon under false pretenses it is error to exclude evidence tending to prove that t defendant had theretofore been convicted of embezzlement of the same money property that is alleged in the indictment to have been procured by false pretens The record of the former indictment and proceedings had thereunder is compete evidence tending to show a former conviction of embezzlement of the same fund in addition thereto the defendant must show by further evidence that he is t same person named in the former indictment, that the transaction is the same a the funds identical. Griffith v. State, 93 O. S. 294.

When a conspiracy has been established prima facie, the testimony of a co federate tending to prove that the defendant paid him money the day after t homicide for services in connection therewith, is competent. State v. Doty, O. S. 258.

Where a signed confession details the defendant's connection with the crin charged and also contains an account of flight shortly following the crime and t actions of himself and one or more of his confederates, the entire confession competent and relevant; but if improper or irrelevant statements are incorporat therein they may be excluded by the court. State v. Doty, 94 O. S. 258.

Where on the trial the testimony discloses that the defendant was the aggresso and the person assaulted was within the peace of the state, and no testimony h

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offered tending to support a plea of self-defense, it is error to admit testimony hreats made and weapons reported in the possession of others than the deceased, especially is this so when the decedent has not been connected with the threats e or with the possession of such weapons. State v. Doty, 94 O. S. 258.

Testimony by the accused before the grand jury that he was not guilty, but v how the murder was committed, was properly admitted at the trial together other incriminating statements and admissions on his part showing guilty wledge. Williams v. State, 11 C. C. (N.S.) 4, 20 O. C. D. 342 (affirmed, 53 L. B. 28).

While it is within the discretion of a trial judge to reopen a case at any time re it is finally closed and let in testimony in chief, it is error to thereafter se to allow the defendant at least a reasonable time to recall his witnesses make answer to the new evidence. Taylor v. State, 12 C. C. (N.S.) 486.

It is only such a conviction as under the old law would have rendered a witness mpetent that can be introduced under the law as it is today to discredit him; where for the purpose of discrediting a witness a record is offered of con- ion of an offense which is not made a crime or misdemeanor under any statute he state, and was in violation of a city ordinance only, it is not error to sustain bjection to its admission in evidence. August v. Finnery, 10 C. C. (N.S.) 433,). C. D. 330.

In the cross-examination of witnesses for the state the defendant can not go those matters which are purely matters of defense. Bennett v. State, 10 C. C. 4 O. C. D. 129.

For evidence that may be introduced on a redirect examination, see Moran v. e, 11 C. C. 464, 5 O. C. D. 234.

Where a person suspected of crime is taken to a private office and questioned two days and nights regarding circumstances surrounding the crime, and is under restraint until released by habeas corpus, and is repeatedly told that e would tell the truth he would be allowed to go, his interrogators assuming e the final arbiters of what was the truth, it is evident that his statements influenced by fear of further restraint or the hope of regaining his liberty, such statements can not be regarded as voluntary.

The claim that the statements made by an accused person under such circum- ces were not confessions, but were admissions, does not make them competent ence against him where they constitute conclusive evidence with reference to crime charged, and to receive such statements as evidence constitutes preju- l error. Kohn v. State, 12 C. C. (N.S.) 197.

By the law of evidence, testimony competent in chief, by that fact is rendered mpetent in reply. The rule, however, is subject to the discretional authority trial court to reopen a case in chief at any time before it is finally closed, and such evidence in. But this should not be done when, without fault on his part, reason of the discharge of witnesses, or otherwise, a party would be cut off from answer to the new testimony, which he might have made if it had been regu- y given. Yet, as in this case, if the record fails to show that a party over se objection evidence in chief has been admitted, out of the usual order, was ived of the right or cut off from the means of answer to it, such action is in legal view prejudicial, even if technically irregular. Donald v. State, 21 . 124, 11 O. C. D. 483.

A conversation between a jail prisoner and an acquaintance, which was over- rd by the sheriff who had concealed himself for that purpose, and during which prisoner made certain inculpatory statements, is admissible in evidence at

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his trial. Morrow v. State, 1 O. A. R. 95, 15 C. C. (N.S.) 561, 24 O. C. D. 1 (affirmed, 90 O. S. 202).

Where in the course of an examination being made by physicians, appoint by a court for that purpose, the accused makes admissions as to his physical co dition, such admissions are admissible in evidence, even though the court had right to order such examination and the physicians had no right to make it a the accused did not know that he was not obliged to submit to such examinati Jones v. State, 20 C. C. (N.S.) 542.

Statements of third persons to the accused, charging him with crime and conduct or replies in response thereto, are admissible in evidence. McLaughlin State, 20 C. C. (N.S.) 492.

The question of the competency of evidence will not be considered where exception was taken to its admissibility. Kohn v. State, 14 C. C. (N.S.) 31, O. C. D. 417.

In a prosecution for arson a judgment of guilty will not be reversed becau of failure to establish the corpus delicti before evidence tending to incrimina the defendant was introduced, where the burning of the property was not d puted and the same evidence which established criminal agency also bore upon t question of the guilt of the accused. Kohn v. State, 14 C. C. (N.S.) 31, O. C D. 417.

Where, in an arson case, the cause or origin of the fire is the subject inquiry, it is prejudicial error to permit witnesses to state the conclusions th have reached from things they have seen and the facts they have related, but t witnesses having related the facts the jury should be left to draw their o conclusions. Accordingly, it is error to permit a witness who has served for ni years in the fire department, and has been superintendent of the salvage co for eighteen years to testify that from his examination of the premises after t fire, his opinion was that the fire started in a certain place in such buildi Carter v. State, 4 O. A. R. 193, 22 C. C. (N.S.) 154.

In order to authorize the introduction in evidence of an admission by t accused that he was guilty of arson, it is sufficient to show that the building confessed burning was in fact burned at the time charged. Berman v. State, 16 C. (N.S.) 106, 25 O. C. D. 386 (affirmed, 81 O. S. 508).

At the trial of one indicted for embezzlement of funds of one for whom he h been appointed guardian, the judgment and orders of a court upon exceptions fil to the accused's inventory and accounts as guardian, are not admissible in eviden Shelley v. State, 19 C. C. (N.S.) 164 (affirmed by supreme court on grounds stat in this opinion, State v. Shelley, 85 O. S. 481).

In a criminal prosecution for embezzling certain bonds, evidence is compete which tends to show that the pledging of the bonds and the use of the procee therefrom by the brokers was not due to an honest misunderstanding by t brokers of their rights in the matter. Hayes v. State, 14 C. C. (N.S.) 497, 25 C. D. 57 (affirmed, 83 O. S. 490).

The provision in the bill of rights that an accused person shall be entitled meet the witnesses face to face, applies to parol testimony only, and does not b the introduction of public records or other instruments in writing which may becor competent in the trial of a criminal case. Folliard v. State, 14 C. C. (N.S.) 20 22 O. C. D. 481.

Inasmuch as the rules of the internal revenue department do not permit t removal of records from the offices of the collectors, and the state is witho authority to compel the production of such records, an exemplified copy of so mu

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d records as will show that the defendant, on trial for alleged violation of ounty local option law, had paid to the United States the special tax ed against retail liquor dealers, of necessity becomes the best evidence that e produced of that fact, and it is not error to permit its introduction. Folliard ate, 14 C. C. (N.S.) 205, 22 O. C. D. 481.

is no objection to the introduction of evidence in a prosecution for the ion of the liquor laws, that such evidence was unlawfully obtained under earch and seizure law. Cohen v. State, 16 C. C. (N.S.) 178.

a prosecution against the proprietor of a saloon for furnishing intoxicating s to a minor in which it appears that the bartender had been instructed e time of his employment not to sell to minors, unqualified and unequivocal of the absence of the proprietor at the time of such furnishing having been in direct examination of the bartender in defense of accused, the narration y independent circumstance to fortify his own statement is improper in examination and properly excluded. Harris v. State, 1 O. A. R. 323, 20 (N.S.) 356, 24 O. C. D. 187.

Where the legislature has provided, as in G. C. § 13050, that the keeping of icating liquors in dry territory in any place except a drug store or private ence shall be prima facie evidence that such liquors are kept for unlawful furnishing or giving away, the burden of proof is changed and a conviction be sustained upon evidence of this fact alone. Nickels v. State, 22 C. C.) 236.

n the trial of an attendant in a hospital for the insane for the unlawful g of one of the patients, it is a deprivation of a constitutional right guaran- to the defendant to admit in evidence a statement by the coroner of what told him three days later by certain insane patients as to the circumstances e killing which they had witnessed, the testimony of members of the medical of the hospital being to the effect that said patients did not have the mental ity to properly observe the incidents which took place or the memory to accurately what took place. Dawson v. State, 5 O. A. R. 130.

Evidence accounting for certain parties, and for their disappearance on the ion of the murder charged in the indictment, is competent where so inextricably woven with the crime that without it a wrong suspicion might arise as to was the perpetrator. Selvaggio v. State, 19 C. C. (N.S.) 88, 25 O. C. D. 139 med, 86 O. S. 366).

On the trial of one indicted for murder in the second degree, it is not reversible to permit an eye witness of the shooting to testify that after the arrest of ccused he went to the police station and picked out the accused as the person did the shooting. Duranec v. State, 16 C. C. (N.S.) 20.

t is not error in a homicide case to exhibit to the jury the mutilated heart of lecedent for the purpose of showing the character of the incision which had made therein as bearing upon the cause of death. Andy v. State, 2 O. A. R. 19 C. C. (N.S.) 93, 26 O. C. D. 146.

t is not error in a trial for homicide to permit a near relative of one of the esses for the state to act as interpreter, where there is nothing tending to that the said interpreter was in any way biased or prejudiced or interested e outcome of the trial. Andy v. State, 2 O. A. R. 103, 19 C. C. (N.S.) 93, C. D. 146.

Where a person is charged under G. C. § 1654 with contributing to the delin- cy of a minor under seventeen years of age, by renting a room to her for the

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purpose of illicit intercourse, and the testimony shows that the minor went t for that purpose, it is not error to permit testimony to be given as to the re tation of the house in which such room is located. Where a person owns and cond a house of ill-repute, the duty is imposed on her to know that those whom permits in her house and to act apparently as her servants, shall obey the l and in case they do not she as principal and proprietor of the house in which delinquency occurs is liable to pay the penalty of the statute. Smith v. St 14 C. C. (N.S.) 257, 24 O. C. D. 661.

A parent who is able by reason of property, labor or earnings to provide or maintenance of his or her child under sixteen years of age, may be convic of failure so to do without proof of notice that the child is in need or of a dem or request that such care or maintenance be provided. Elem v. State, 5 O. A. R. 24 C. C. (N.S.) 296.

Where the woman with whom the defendant was living as his wife, at time of the commission of the crime, is shown to have been previously mar to another man who was still living and from whom she had not been divor it is competent for the state to call her as a witness against the defendant. Ly v. State, 5 O. A. R. 16, 23 C. C. (N.S.) 230.

In a prosecution for being a known gambler, papers, race horse slips telegrams found at the time of the arrest lying on the desk of the defend by the arresting officers are competent in support of the charge pending agai him, on the same principle that incriminating tools found on the person of charged with burglary, or counterfeiting devices found in possession of one char with counterfeiting, are admissible in evidence though not necessary for convict nor sufficient when solely relied upon to warrant conviction. Hirsch v. Cincinn 21 C. C. (N.S.) 561 (motion for leave to file a petition in error overruled, O. L. R. 76).

In a prosecution for subornation of perjury in procuring a false report to made by the treasurer of a banking company, it is not error to permit the accu who was the president of such company, to be asked on cross-examination number of depositors of such bank; since it appeared from the evidence that total overdrafts of such depositors amounted to about five hundred dollars, w the overdrafts of another corporation of which such accused was an officer, amoun to three hundred and fifty thousand dollars. Walker v. State, 18 C. C. (N.S.

In a prosecution for perjury for falsely swearing in a murder case that he the murdered man knocked down by another at a certain place, the falsity of statement may be proved by a witness who was either with the murdered m at the time, or with the witness accused of perjury. Ruch v. State, 2 O. A. R. 18 C. C. (N.S.) 391, 24 O. C. D. 675.

A woman who voluntarily submits to an operation for the purpose of caus a miscarriage is an aider and abettor of the crime, and in the prosecution of the who caused the operation to be performed her evidence should be regarded as t of an accomplice. Waite v. State, 4 O. A. R. 451, 23 C. C. (N.S.) 455 (motion leave refused, 13 O. L. R. 455).

It is competent to admit a dictagraph in evidence, with an explanation of scientific principles upon which it operates and a demonstration of the instrum in operation, notwithstanding the one so used was not the identical instrum used in the detection of the defendant. Andrews v. State, 15 C. C. (N.S.) 23 O. C. D. 564.

Statements made by the accused in Italian in answer to questions put to in the same language by police officers, after his arrest, may be given to the j

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nglish by said officers, their ability to understand and translate Italian cor-
y being first inquired into and put before the jury. Riolo v. State, 19 C. C.
.) 248.

When the ground has been properly laid for impeaching a witness, it is not
to permit a stenographer who took his testimony before the grand jury to
that certain questions were there asked the witness and answers given by
and the stenographer may refresh his memory from his written notes of such
mony. John v. State, 16 C. C. (N.S.) 316.

A charge to the effect, "If you believe beyond a reasonable doubt that time
ed between the fight on the hill and the killing, what was done in the previous
rel will have little weight in this case. When a quarrel is over and the
es have separated, no one has a right to attack another to avenge himself
or any reason arising out of a quarrel that has passed and gone. In so far
e law is concerned, it is entirely a separate occurrence, separate and apart,
ne has elapsed," is erroneous because it cuts off all weight to be given to the
ous quarrel upon the mere lapse of time. John v. State, 16 C. C. (N.S.) 316.

The testimony of the magistrate, before whom the accused was brought for
preliminary examination, that he privately admitted his guilt, is competent
nce at his subsequent trial before the common pleas. A letter written by
accused to the prosecuting witness is not competent evidence against him,
where he failed to take the stand and deny its authenticity and his guilt was
lished beyond a doubt by competent testimony and his own admission, the
nent finding him guilty will not be reversed. Smith v. State, 15 C. C. (N.S.)

The cross-examination of a defendant in a criminal case who offers himself as a
ess, as to shady transactions which the questions assume he was connected
such cross-examination being solely for the purpose of testing his credibility,
nited only by the sound discretion of the court, and a judgment will not be
sed for permitting such cross-examination, unless it appears from the record
such discretion was abused to the prejudice of the accused. Golner v. State,
C. (N.S.) 571.

While declarations of conspirators are not admisible as proof of the conspiracy,
irect evidence of conspirators as to the fact of the conspiracy of which they
personal knowledge is admissible. Townsend v. State, 17 C. C. (N.S.) 380,
C. D. 408.

Though no one of the witnesses in a criminal case identifies the accused beyond
sonable doubt, the collective effect of all their testimony may be sufficient to
ate any doubt upon that subject. Lowther v. State, 18 C. C. (N.S.) 192.

The police court of a municipal corporation may take judicial notice of its
ances, but the common pleas and circuit courts may not do so. Gates v.
land, 18 C. C. (N.S.) 349.

In order to establish guilt on the part of the keeper of a dram shop, under an
ance making it a punishable offense to "permit such place to be used, fre-
ted or resorted to by (among others) any common prostitute," it must be
to appear from the evidence that the persons named in the affidavit were
non prostitutes and that the defendant had knowledge that persons so using,
enting and resorting to his place were of the character charged; and in the
of one so accused it is error to refuse to admit evidence that the instructions
e defendant to his employes were to exclude objectionable characters. Burns
lumbus, 13 N. P. (N.S.) 508.

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In a prosecution for offering commodities for sale in a measure which is no tested, marked and sealed by the city sealer of weights and measures, the questio of the belief of the accused that he had a right to have the box sealed is immateria although such belief was based upon the statement made by a former sealer o the municipal corporation; and accordingly, it is not error to refuse to permit th accused to answer the question which is asked by his attorney, "In using tha box, did you believe that you had a right to have it sealed." Gates v. Clevelan 11 N. P. (N.S.) 545, 21 O. D. 141.

It is within the discretion of the court to reopen a case for the purpose o calling a witness to testify as to a point involved in a special charge which ha been asked. State v. Griffith, 18 N. P. (N.S.) 161 (affirmed by court of appeals

A refusal to permit a witness to answer certain questions on direct examina tion is not reversible error, unless the record shows what the party who offe such witness expects his answer to such question to be. State v. Griffith, 18 N. P (N.S.) 161 (affirmed by court of appeals).

If the trial court in a criminal proceeding, which is tried without the inte vention of a jury, views the premises on his own motion after announcing i open court that he will do so, and the defendant does not object thereto, suc action on the part of the trial court is not reversible error. Even if such obje tion had been made in time, the court would have the right to view the premise as a jury might have done, either before or after the evidence was taken. Ame v. State, 11 N. P. (N.S.) 385, 22 O. D. 92.

Special instructions.—Courts can not be required to instruct a jury upo abstract propositions, but are bound to meet and decide every legal proposition tha arises in a case. Lewis v. State, 4 O. 389.

On the trial of a criminal cause, the court may properly refuse to give to th jury a specific instruction which, though correct under a different state of facts requires essential modification to prevent it from misleading the jury, and excludin from their consideration the particular and material facts and circumstances o the case in hand. Callahan v. State, 21 O. S. 306.

It is not error for the court to refuse to give the jury in its charge a true an pertinent proposition of law asked by counsel, provided it appears from the whol charge that the court fairly and fully stated the law applicable to the case although in different form and language. Bond v. State, 23 O. S. 349.

Where the record shows that the court refused to give, "in the language an form" requested, a true and pertinent proposition of law in its charge to the jury it will be presumed, in the absence of anything appearing in the record to th contrary, that the same charge was substantially given, though in another lan guage and form. Bolen v. State, 26 O. S. 371.

Where a charge is asked which is so indefinite and uncertain as to be calcu lated to confuse or mislead the jury, it ought to be refused. Adams v. State 29 O. S. 412.

The special instructions authorized by this clause, if insisted on by the part requesting them, are to be reduced to writing before the argument is commence so that counsel may have the benefit of them in the argument. Griffin v. State 34 O. S. 299.

While the court, when requested to charge under Revised Statutes, § 7300 clause 5, is bound to give or refuse the charge, the court is not required to charg in the language of counsel, however sound in law or pertinent to the case th proposition may be, but the judge may select his own language; and where

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is not given, substantially, it is to be regarded as refused. McHugh v. 42 O. S. 154.

here, in a criminal prosecution, the evidence of the state tends to prove mmission by the defendant of the crime charged at a particular time and nd the evidence introduced by the defendant tends to show that at such time at another place, it is error for the court to refuse an instruction, requested endant's counsel, that: "One of the defenses interposed by the defendant case is what is known in law as an alibi. That is, that the defendant was her place at the time of the commission of the crime. The court instructs at such a defense is as proper and as legitimate if proved as any other, and lence bearing on that point should be carefully considered by the jury. And iew of all the evidence the jury have any reasonable doubt as to whether endant was in some other place when the said crime was committed, you give the defendant the benefit of the doubt and find him not guilty. The nstructs you further that the defendant need not prove such alibi by a derance of the evidence. Neither does he need to establish it beyond a ble doubt, but if the evidence as introduced creates in your mind a reasonable f the defendant's guilt, then your verdict should be not guilty, even though ould not be able to find that the alibi was fully proved," and to fail to give truction whatever bearing specially upon the subject. Walters v. The State, . 215, approved and followed. Burns v. State, 75 O. S. 407.

e question as to the weight of the evidence being for the determination of y and not of the court, it is not error for the court to refuse an instruction stimony as to the previous good character of the accused is entitled to great The court would, however, be in the line of judicial duty, as favoring trial, if it should give a pertinent instruction embodying the correct rule applicable to the evidence. Burns v. State, 75 O. S. 407.

indictment charging, in separate counts, shooting with intent to kill and g with intent to wound, includes the lesser offenses of assault and battery sault, and upon the trial of the accused upon such an indictment the jury nd the accused not guilty of shooting with intent to kill and not guilty of g with intent to wound, but guilty of assault and battery or an assault While the court should have given a further charge in relation to assault ttery, yet mere failure to give further proper instructions is not the equiva- giving an erroneous charge, nor is it the equivalent of a refusal to give a charge when requested. State v. McCoy, 88 O. S. 447.

here an indictment charges the offense of rape with consent under G. C. , it is error for the court to refuse to charge that if the evidence fails to hat the defendant is guilty of the completed offense under G. C. § 12414 endant may be convicted of an attempt to commit the offense. State v. ore, 90 O. S. 196.

on the trial of a criminal case it is not error for the court to refuse to t the jury, at the request of the defendant, upon matters of law before gument begins. Morrow v. State, 1 O. A. R. 95, 15 C. C. (N.S.) 561, 24 . 140; Umbenhauser v. State, 4 C. C. 378, 2 O. C. D. 606; affirmed, 23 W. L. (Morrow v. State is affirmed with opinion, 90 O. S. 202).

special charge, applicable to the case on trial, and stating the law correctly, t properly be refused by the court, because asked for by the defendants he argument and the general charge to the jury. Venable v. State, 1 C. C. O. C. D. 605.

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If, in a criminal case, the counsel for the defendant requests the court to to the jury, before the commencement of the argument, an instruction applicab the case and containing a correct statement of law, and one proper to be given, the duty of the court, before the argument, to give the same as requested, o substance of it in other language, and if not so done, it is error. McGuire v. S 3 C. C. 551, 2 O. C. D. 318.

A request to charge a proposition of law correct in the abstract, but ha no relevancy to the case on trial, may be properly refused. Corbett v. Sta C. C. 156, 3 O. C. D. 79.

The mere failure of the court to instruct upon a particular point of la not erroneous. To make it ground for error the instruction should have requested. Jones v. State, 20 O. 34; Mitchell v. State, 21 C. C. 24, 11 O. C. D.

The failure of a court to give a detailed and comprehensive instruction a point upon which no additional or further instruction is asked by the who complains of the charge as given is not reversible error. Murray v. S 23 C. C. (N.S.) 508 (citing State v. Schilby, 70 O. S. 1).

If a request is made to the court to charge a number of propositions nately and not as a series, the court does not commit error in refusing to gi proposition if part of such proposition is erroneous, although the greater part of proposition is correct. Walker v. State, 18 C. C. (N.S.) 1.

In the trial of one accused of having committed murder while attemptin perpetrate a robbery, the failure of the court to define an attempt to perpe a robbery is not error where no such definition is requested. Murray v. S 23 C. C. (N.S.) 508.

It is not necessary in a prosecution of one over eighteen years of age for ing carnal knowledge of a girl under sixteen years of age with consent, that defendant be shown to have known or to have good reason to believe that the was under sixteen years of age. It is not error to refuse a request to charge such knowledge is necessary. Zent v. State, 3 O. A. R. 473, 21 C. C. (N.S.) 25 O. C. D. 219.

A father is bound at his peril to know when his minor children need fu provision for their home, care, food or clothing, and to see that such provi when needed, is made, if he is able to make it, and it is no defense in an a for neglecting minor children, that the father did not have notice from the m or person having the custody of the children that they required his assist A request to charge that to find defendant guilty, such notice must be show properly refused. Moore v. State, 18 C. C. (N.S.) 482, 24 O. C. D. 487.

The addition by the court to a special instruction to the jury asked by defendant in a homicide case of the words, "and to some degree contrib thereto," was not prejudicial but mere surplusage, since the conclusion tha was an aider or abettor could not be reached by the jury unless there was dence tending to show that he did something in furtherance of the common pu to take the life of the decedent. Andy v. State, 2 O. A. R. 103, 19 C. C. (N.S. 26 O. C. D. 146.

It is error to refuse to charge: the nature of the crime of embezzleme such that although money may be received by an agent or servant from tim time as it comes into his hands lawfully, there may be no completed crim embezzlement until, having thus received several sums at different times finally refuses or is unable to account for the aggregate amount. Shelley v. S 19 C. C. (N.S.) 164 (affirmed by supreme court on grounds stated in this opi State v. Shelley, 85 O. S. 481).

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It is error to refuse to charge: one is not guilty of embezzlement who has not
ealed the receipt of money alleged to have been embezzled, but, on the con-
r, has claimed in good faith to keep it under some right as against the owner.
ey v. State, 19 C. C. (N.S.) 164 (affirmed by supreme court on grounds stated
is opinion, State v. Shelley, 85 O. S. 481).

Under G. C. § 13590 it is not necessary that an indictment which charges a
piracy to defraud should allege that the conspiracy was to defraud a certain
ty; and accordingly, it is not error to refuse a charge that the state must
e the intent to defraud such county as a part of its case. Townsend v. State,
C. (N.S.) 380, 25 O. C. D. 408.

The removal of a dead foetus is not producing a miscarriage within the con-
lation of the statute; and one accused of causing the death of a woman
igh an attempted miscarriage is entitled to an instruction to the jury to the
t that if he honestly believed from his examination of the patient that there
a dead foetus in her uterus, and administered chloroform to her as an anes-
c with the intention of removing said foetus, and she died from the effects
he chloroform before an operation had been attempted, he should be found
guilty; and it is error to refuse defendant's motion for an instructed verdict
ot guilty. Tippie v. State, 1 O. A. R. 13, 15 C. C. (N.S.) 522, 24 O. C. D. 203
lified and affirmed, State v. Tippie, 89 O. S. 35).

Argument.—The court, in the trial of a criminal case, has the power to limit
time to be occupied in the argument of the case to the jury. The exercise of
power should be reasonable, leaving full time for the fair discussion and
entation of the case. Weaver v. State, 24 O. S. 584.

The constitutional right of a person accused of felony "to appear and defend
erson and with counsel," can not be denied, or its exercise unreasonably
lged; but the court may limit the argument of the accused or his counsel,
ided that the accused is not thereby deprived of a fair trial. On the trial
ne charged with a felony, eleven witnesses were examined, and the evidence,
h occupied half a day in its delivery, was circumstantial and conflicting. The
sed was defended by two counsel, who were limited by the court to thirty
utes in the argument to the jury. Held, that this was an abuse of power,
h prevented a fair trial. Dille v. State, 34 O. S. 617.

Where counsel for the plaintiff address the jury (the testimony being closed),
the counsel for defendant decline a reply, the counsel for the plaintiff can not
ess the jury a second time. Goodenow v. Tappan, 1 O. 60.

Statements by the prosecuting attorney in his closing argument to the jury
eying the impression that a certain record which had not been introduced in
ence would show, had the state been permitted to introduce it, that the de-
ant had been an inmate of the penitentiary, are improper, and should be
pproved by the court at the time. To overrule an objection to such statements,
giving the court's approval of them, is error. Burns v. State, 75 O. S. 407.

If the trial judge is temporarily absent during a part of the argument, in
r to prepare his charge for the jury, and it is not claimed that any misconduct
ounsel took place during such absence, such absence, if erroneous, is not
udicial to the defendant. Tingue v. State, 90 O. S. 368 (distinguishing Miller
tate, 73 O. S. 195).

For a discussion of misconduct at a criminal trial, see Baxter v. State, 91
. 167.

Where a person is present in court competent to testify, and it appears that
he claim of a party omitting to call such person as a witness was correct, it

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could be established by such person, the failure to call him, if not adversely inte ested or biased, may properly be commented upon by the opposing counsel in hi argument to the jury. McGuire v. State, 3 C. C. 551, 2 O. C. D. 318.

On the trial of a criminal case, it is not the absolute right of counsel, t read to the jury as a part of his argument, extracts from law books which h claims state the law governing the case. The jury is bound to receive and b governed by the law as declared by the court, and the court has the discretion t allow or refuse such a mode of argument to the jury. Id.

As to the prosecutor stating facts outside of the evidence, see Schneider v State, 2 C. C. 420, 1 O. C. D. 565; Thurman v. State, 4 C. C. 141, 2 O. C. D. 46

As to comments by the prosecutor on admissions, see Searles v. State, 6 C. C 331, 3 O. C. D. 478.

In a criminal case, where it is plain from the evidence that the jury coul not have reached any conclusion other than that which was reached, a verdict wi not be set aside for reprehensible misconduct of the prosecuting attorney. Sisso v. State, 19 C. C. (N.S.) 99.

It is not proper for a prosecuting attorney to urge the jury to find th accused guilty of murder in the first degree and not to recommend him to merc and in so doing refer to his own record and reputation as prosecuting attorney an express the hope that while he held that position in that county no one who wa guilty of murder in the first degree should be recommended to mercy; but if th evidence clearly shows that the accused was guilty of murder in the first degre and the verdict contains a recommendation to mercy, such error is not ground fo reversal, even though the trial court erred when objection was made to such arg ment in holding that such argument was proper. Sisson v. State, 19 C. C. (N.S.) 9

Misconduct by the court or prosecuting attorney is of little moment to a accused person against whom evidence has been presented which establishes hi guilty completely. Hayes v. State, 14 C. C. (N.S.) 497, 25 O. C. D. 57 (affirme 83 O. S. 490).

Inasmuch as in practically every trial counsel ask questions which call fo incompetent testimony, it will not be regarded as misconduct so to do, wher there is reason to believe counsel was honestly mistaken as to the competenc of the testimony he was seeking to bring out. Andrews v. State, 15 C. C. (N.S. 241, 23 O. C. D. 564 (leave to file petition in error refused, 57 Bull. 520).

Picturesque and exaggerated language used by counsel for the state in addres ing the jury in a criminal case does not necessarily require a reversal of th conviction. Walker v. State, 18 C. C. (N.S.) 1.

In a criminal prosecution for subornation of perjury in procuring a fals report of a banking company, it is not error for the prosecuting attorney to sa in argument that the defendant was entitled to justice, but that he was no entitled to any more because he was defendant, and that he was not entitled t more than if he were among the seven or eight thousand depositors, who seeme to sympathize with the prosecution, and all of whose property had been swept awa by the misconduct of the defendant, if it appeared that there were between six an seven thousand depositors, and that they had lost more than a million dollars by th wrongful act of the defendant. The fact that the number of depositors wa slightly overstated, and that they did not probably all of them lose all of thei property, does not make such argument reversible error. Walker v. State, 1 C. C. (N.S.) 1.

No prejudice results from mis-statements as to the crime charged by th prosecuting attorney in his opening statement of the case to the jury in a crimina

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se, if, after the evidence is all in the trial judge instructs the jury to consider ly the evidence admitted and to disregard all statements of the prosecuting torney with regard to evidence offered, but not admitted. Lieblang v. State, C. C. (N.S.) 179, 21 O. C. C. (N.S.) 539.

In a prosecution against the father for failing to support minor children who re awarded to the custody of their mother when she obtained a divorce from the cused for his aggression, it is error for the court to permit the prosecuting torney to say to the jury in argument, "The defendant had not contributed e cent to the support of the children before the divorce was granted;" if such tement is not supported by the evidence; and such error is not cured by the monition of the court, "I would disregard all reference as to what had preceded e divorce. On your side of the case, I will say this, that you need to go no ther into that, any more than on the other side they should go into the ounds." If there is evidence tending to show that the children have in fact eived proper food and clothing from someone, and if there is some evidence ding to show that defendant is not physically or financially able to support his ldren, the court can not say from the record that he is guilty beyond a sonable doubt, and such misconduct is accordingly reversible error. Moore v. ate, 18 C. C. (N.S.) 482, 24 O. C. D. 487.

A judgment of conviction in a criminal case will be reversed for misconduct counsel, though the jury be cautioned with respect thereto, if on the whole ord it is not clear that the defendant was guilty beyond a reasonable doubt. ore v. State, 18 C. C. (N.S.) 482, 24 O. C. D. 487.

In a prosecution for rape, it is not error for the prosecutor to comment to the y upon the appearance of the prosecuting witness claiming that she was parently weak both in mind and body; or to comment to the jury upon the pearance of the accused as he sat in court claiming that he was evidently a ong and powerful man. Frey v. State, 22 C. C. (N.S.) 607.

Where the circumstances seem to indicate that the crime was committed by her the prosecuting witness or the accused, the use by the prosecuting attorney language in his argument to the jury which leaves in their minds the impression t the prosecuting witness had been tried and acquitted of the crime and had no tive to testify otherwise than the truth, leaving them to conclude that the endant must be the guilty one, is misconduct of a prejudicial character. Goings State, 24 C. C. (N.S.) 145.

Charge of court.—The mere failure of an inferior court to instruct the y upon a particular point of law arising in a case, is not erroneous. To make h failure a ground of error, the court should have been requested to instruct on it. Jones v. State, 20 O. 34.

The defendant's counsel having asked the court to charge the jury, on a given te of facts, that the indictment was not proved, the court did not take from the y the decision of any question of fact by charging that "such proof would sustain h allegation of intent." Fairly construed, the meaning of the charge is, that posing the proof to be as stated, there was no variance between it and the ictment. Stoughton v. State, 2 O. S. 562.

It is not error for the court, in charging the jury, to recite what is claimed the parties to be proved, when this is fairly done, for the purpose only of a per explanation of the law applicable to the case. Mimms v. State, 16 O. S. 221.

It is not error for the court, in criminal prosecutions, to instruct the jury to the form of a verdict proper to be rendered by them; and the court may e them such forms of a verdict in writing, either of which it will be proper

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for them to adopt, as they may find the facts to require, under the instructio of the court. Mimms v. State, 16 O. S. 221.

The court is not bound to reduce written instructions to writing unle requested so to do before the argument of the case to the jury, nor to re or deliver the charge when so reduced to writing until after the close of t argument, if any argument is made. Blackburn v. State, 23 O. S. 146.

It is no error in the court, while charging the jury, to repeat to them t statement of a witness, and to inform them, where such is the fact, that couns on both sides admit the truth of the statement; the fact that such admission w made by counsel will be presumed, and where the contrary is not shown by t record. Bond v. State, 23 O. S. 349.

By the Court: It is also insisted that the court erred in stating to the jur that there was testimony in the case tending to support or corroborate the accom plice, although its weight was left to the jury. It is clear the court did not er Whether evidence tends to establish a fact is a question of law. Whether it do establish it is a question of fact. Berry v. State, 31 O. S. 219.

In the trial of a jury case, the judge is not required to sum up the evidenc It is not improper to do so, providing it is fairly done, and all the materi evidence on both sides fairly presented. But it is improper and erroneous for t judge to single out isolated parts of the testimony and instruct as to t law arising on the facts which such testimony tends to prove, or to give undu prominence to some portions of the testimony, and entirely pass over other portio equally important, or give the same but slight attention. Morgan v. State, 4 O. S. 371.

When a court has charged a jury upon a point, and afterward an instructio is prayed, which, in substance, is the same as the charge given, it is not erro to decline giving it on the ground that the court has already charged on tha point. Stewart v. State, 1 O. S. 66.

Where a charge is asked which is so indefinite and uncertain as to be calcu lated to confuse and mislead the jury, it ought to be refused. Adams v. Stat 29 O. S. 412.

In a criminal, as well as in a civil case, the judgment will not be reversed fo a misdirection of the court to the jury, on an abstract question of law, that coul not arise upon the testimony, or influence the decision of the jury. Stewart v State, 1 O. S. 66.

On the trial of a person indicted for the crime of assault with intent to rob it is error to refuse to charge that violence, in order to constitute the crime, mus not be subsequent to the attempt to take the property. Hanson v. State, 43 O. S. 376

The jurors in a criminal case, after retiring to consider of their verdict returned into court and requested the judge to state his recollection of the evidenc of a witness who had given material testimony on the trial. Held, that to compl with the request, is not error. Hulse v. State, 35 O. S. 421.

In a criminal case, it is error to charge the jury that proof of the prisoner' good character is entitled to less weight where the question is one of great an atrocious criminality, than upon accusations of a lower grade. The presumptio of innocence which it raises varies in force with the circumstances, but not wit the grade of the crime charged. Harrington v. State, 19 O. S. 264.

Such indictment will support a conviction for assault and battery, and it i error to refuse to so charge. Howard v. State, 25 O. S. 399.

The judge has no right to communicate with the jury respecting the charg of the court after the jury have retired, except publicly, and by affording the accuse

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ortunity to be present. Kirk v. State, 14 O. 511; Jones v. State, 26 O. 208. See, also, Campbell v. Beckitt, 8 O. S. 210.

For what was held to be an abuse of the power, see Dille v. State, 34 O. S. 617.

Special instruction given to the jury, in writing, after argument, is not re- red to be taken by the jury in their retirement, where the principal charge is required to be in writing. Griffin v. State, 34 O. S. 299.

Jury must take law from the court, and must not judge of the law. Robbins State, 8 O. S. 131.

One on trial for a crime is not denied the benefit of a reasonable doubt by instruction to the jury that there should be a verdict of guilty, if a full and did consideration of the evidence produces a conviction of giult, and satisfies mind to a reasonable certainty; but that there should be an acquittal if the dence establishes only strong probabilities of guilt. State v. Allen, 68 O. S. 516.

Where the court, after stating the rule of law as to the presumption of ocence, adds that "in all doubtful cases this presumption is sufficient to turn scale in favor of the prisoner" and immediately follows it by a statement of the e that unless the jury find the accused to be guilty beyond a reasonable doubt, is entitled to an acquittal, such instruction is neither erroneous nor misleading. te v. Knapp, 70 O. S. 380.

A statement by the court in its charge to the jury, that "sane men who are ocent, as a rule, do not make confessions of crime," the defense of insanity and fessions by persons of sound and unsound mind being the subject of the truction to the grand jury, such statement is not prejudicial to the defendant. te v. Knapp, 70 O. S. 380.

Reference to the testimony of an accomplice may be reversible error, if judicial to the accused. If the common pleas court erred in its charge to jury with reference to the testimony of an accomplice the judgment of the mon pleas court will be set aside. Kilbourne v. State, 84 O. S. 477.

Evidence of previous good character was offered by defendants, and the court luded in its charge a statement that "proof of good character may of itself ate a reasonable doubt, where otherwise no such doubt would exist." It was d that this was erroneous, for the reason that it gave undue prominence and effect such testimony, and that the court should have instructed the jury to consider same in connection with all the other evidence in the case, in arriving at a dict. State v. Hare, 87 O. S. 204.

An indictment was found against two county commissioners for accepting a be in connection with the award of a contract for repairing a bridge, in violation G. C. § 12823, and the two contractors who were alleged in the indictment to re given the bribe and the third commissioner, were called as witnesses by the te, and compelled to testify under authority of G. C. § 12824-1. Their testimony ded to prove that said award was made under and pursuant to a general under- nding or agreement between the two contractors, who were partners, and the ee commissioners with reference to county work, and certain other evidence was ered by the state in corroboration thereof. The court charged the jury that conspiracy or agreement claimed by the state to exist as above, "must be ablished beyond a reasonable doubt by other testimony and otherwise than by testimony" of said two contractors and the third commissioner, before the jury uld be warranted in finding the defendants or either of them guilty. It was held t the obvious effect of such charge was to entirely withdraw their testimony m consideration by the jury, whereas the same should have been submitted under

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proper instructions as to the weight to be given thereto, and the charge was the fore erroneous. State v. Hare, 87 O. S. 204.

This section was passed in order to make it the duty of the trial judge charge the jury, and it was intended to change the rule laid down in Jones v. St 20 O. S. 34, to the effect that the court was not bound of its own motion to instr the jury. An omission to charge the jury that an indictment which charges shoot with intent to wound includes assault and battery, is erroneous; but such er is prejudicial to the state and not to the accused. State v. McCoy, 88 O. S. (distinguishing Beaudien v. State, 8 O. S. 634).

A general exception to the charge of a trial court does not raise any question error as to the omission of the court to give further correct instruction, but prese only questions of errors of law existing in the charge as given. State v. McCoy, O. S. 447 (approving and following Railway Co. v. Ritter, 67 O. S. 53).

Where, upon the trial of a person charged by indictment with shooting w intent to kill and shooting with intent to wound, the court properly charges the j upon all issues in the case, except that it inadvertently omits to charge that defendant might, if the evidence warrants, be found not guilty of shooting w intent to wound, but guilty of assault and battery, and the court's attention not called to this omission and no request to give such a charge is made, a judgm of conviction of the accused of shooting with intent to wound should not be rever for such inadvertent omission of the court to so charge. State v. McCoy, 88 O. S.

At the time proof of other similar offenses tending to show the corrupt course dealing of a public official is offered in a trial for the solicitation of a bribe trial judge should limit its competency to the specific intent charged in the ind ment, and if reference be made thereto in the charge the same limitation should made by the trial judge. State v. Davis, 90 O. S. 100.

If the door of a chicken house which is hung upon hinges is left open ab fifteen inches and is thus held by means of a post on one side and a brick on other, the act of moving such post and brick and opening such door so that it is l open is a forcible breaking, as an element of burglary, and it is not error to charge. Goins v. State, 90 O. S. 176.

The accused is required to establish the plea of self-defense by the preponderan of the evidence, and it is not error to so charge. State v. Vancak, 90 O. S. 211.

If the court in a criminal proceeding states in its charge to the jury what adm sions were made by defendant in open court, and defendant excepts to the cha as a whole except as to the statement concerning the admissions, the accuracy such statement of the court in such charge concerning the admissions can not considered by the reviewing court. State v. Vancak, 90 O. S. 211.

While the right to take life in self-defense exists where the slayer, in proper and careful use of his faculties believes in good faith and upon reasona grounds that he is in imminent danger of death or great bodily harm and that only means of escape from such danger will be by taking the life of his assail even if he is in fact mistaken as to the existence or imminence of the danger, it is reversible error to charge that the appearance of danger must have been such as alarm a man of ordinary firmness, if the undisputed evidence, including the testim of the defendant, shows that he was a man of ordinary firmness. Napier v. State, O. S. 276.

A charge given before argument to the effect that "Testimony has been admit in the trial of this case tending to show that on Saturday evening, January

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, a conversation between A and her daughter B, the deceased, was had in the ence and hearing of the defendant C, and that defendant was silent and left the n without speaking. You are instructed that such silence is not a confession he defendant of the commission of the crime charged in the indictment in this , or of any crime, and that in themselves that conversation and defendant's silence not sufficient to authorize a conviction of the defendant in this case. That ence was admitted only for the purpose of allowing you to consider his conduct hat time and place, as tending, in connection with evidence of other facts, to e the defendant guilty of the charge made against him by the indictment or ded within its terms, and it is your duty to consider it for no other purpose ever," in connection with the following provisions of the general charge, "Such ence should be received and considered with care and caution, and with proper deration of all circumstances and conditions that would be likely to influence action of the defendant with a view to determining the motive that induced his ce, if you find he was silent. If it be doubtful whether the statements were ctly heard or understood, by the defendant, or circumstances existed which t prevent a reply, or render it improper or inexpedient to reply, or if his silence be attributed to any motive other than acquiscence in the truth of the statement hich his silent assent is claimed, the evidence would then be entitled to no ht or consideration for any purpose. It is your duty to follow the instruction e court as to the purpose for which such evidence may be considered, and it is province to determine the weight to be given such evidence for the purpose d," is not erroneous to the prejudice of the accused. Hoover v. State, 91 O. S. affirming judgment of court of appeals, which affirmed, State v. Hoover, 17 N. P.) 65, 24 O. D. 212.

The crime of embezzling or misapplying bank funds is not inherently a joint se, but it is a joint and several offense. It may be committed by one person y number of persons; and accordingly, the fact that the prosecuting attorney entered a nolle prosequi as to one of the defendants is not ground for dis- ging the prosecution as to the other. A charge directing a verdict for defendant ror, but the error is counteracted by a faulty indictment. State v. Keith, 91 132 (distinguishing Stephens v. State, 14 O. 386).

The question of agency and the question of time of forming criminal intention charge of embezzlement are questions for the jury, and unless there is entire re of proof as to any essential elements of the crime of embezzlement, the court t authorized to direct a verdict. State v. Gross, 91 O. S. 161.

The principle of estoppel as applied to agency may be invoked in criminal as as civil cases, and when the indictment is faulty in charging the specific crime nitted, but there is abundance of evidence to prove the offense, a charge directing rdict for the defendant is error. State v. Gross, 91 O. S. 161.

Where G, under the name of K, entered into a written contract of agency with nsurance company, and pursuant to such agency he sells corporate stock of such rance company by virtue of which he collects money for the sale of such stock, fails to account for such money to the said insurance company, upon prosecution embezzlement, G is estopped to deny that he was the agent of said insurance pany upon the ground that K was not his correct name, but upon the contrary, name was G. A verdict of acquittal on the ground that the crime charged in the tment has not been proven is error and will be reversed. State v. Gross, 91 O. 61.

The defense by one who is on trial for embezzlement that he is not an embezzler, a thief, is not one which is to be received with great favor; and error results in

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directing a verdict for the defendant on the ground that the crime charged in indictment had not been proved. State v. Gross, 91 O. S. 161.

In the prosecution of one for embezzlement, a written contract between accused and his alleged employer, which purports to be a contract of agency sufficient evidence of the fact of such agency; and it is error to direct a verdict the defendant on the ground that the crime charged in the indictment has been proved. State v. Gross, 91 O. S. 161.

Where evidence of other offenses of a similar character is competent to p intent, and the accused has not theretofore been convicted of such offenses, the bu is upon the state to prove that the accused is guilty of such other offenses by same degree of proof required in all criminal cases. Error results if the court fail instruct the jury at the time such evidence was received as to the purpose for w it was competent. Baxter v. State, 91 O. S. 167.

If evidence of other offenses is admitted for the purpose of proving intent, such evidence is not sufficient to make out a prima facie case of guilt in such for transaction, it is error for the trial court not to instruct the jury to disregard s evidence. Such omission is not cured by a charge to the effect that the jury n find beyond a reasonable doubt that the defendant was guilty of such o offenses, before it could consider such evidence for any purpose. Baxter v. State O. S. 167.

If it appears that the trial court charged the jury upon the question of assa and the bill of exceptions does not set forth the charge in full, it will be presu that the trial court defined the offense of assault so clearly that the jury un stood its essential elements. Snyder v. State, 92 O. S. 167.

If the bill of exceptions does not show the evidence upon which the trial c based its instructions to the jury, it must be presumed that the proceedings in trial court were regular, if the charge in question could be justified by any poss condition of the evidence. Snyder v. State, 92 O. S. 167.

It is error upon the trial of the second indictment for obtaining money u false pretenses, to charge the jury that it can not consider any question relatin a previous conviction for embezzlement of the same property. Griffith v. St 93 O. S. 294.

A separate count charging each crime may be contained in one indictment, upon the trial of such indictment the court should instruct the jury that the acc can not be found guilty of both crimes with reference to the same money or prope The rule is the same where these crimes are charged in separate indictments, an it appears from the evidence that the state has theretofore procured conviction the embezzlement of money, the accused can not be found guilty upon a sec indictment of obtaining the same money by false pretenses. Griffith v. State O. S. 294.

At the trial of one who is charged with forging a certain instrument, with ut ing and publishing the same false and forged instruments and obtaining a cer sum by false pretenses, it is proper to charge, "The defendant can not be convi of obtaining money under false pretenses on the third count as charged in indictment, unless this check was forged or altered at the time he presented i the bank. False pretenses consist in making a representation to another of existing fact, which the party making it knows to be false at the time, with intent that the party to whom they are made should act upon them and the p must act upon them to its detriment;" but if the jury find that the accused is guilty of forgery and not guilty of uttering and publishing a false instrument the only evidence of obtaining money under false pretenses is evidence tending

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v that the accused presented a check to the bank and obtained money thereon r having forged the same or knowing it to be forged, it is error to render judg- t upon a verdict of guilty. Griffith v. State, 93 O. S. 294.

Upon trial on an indictment charging that the defendant, being a male person he age of eighteen years, carnally knew and abused a female person under sixteen s of age with her consent, an instruction by the court that the indictment in- es the offense of assault is not erroneous. Snyder v. State, 92 O. S. 167.

Where the state has indicted a defendant as a principal offender for murder he first degree, but on the trial prosecutes him only as an aider and abettor lodges its entire case upon proof of a conspiracy to commit an unlawful act by use of deadly weapons or force and violence of such character as would reasonably xpected to cause the death of another, it is error to charge the jury that if it s that the shot was fired by the principal offender without the knowledge, con- nce or assent of the defendant the jury must acquit. State v. Doty, 94 O. S. 258.

A special charge could not be refused solely on the ground that it was requested r the argument of counsel and the general charge to the jury. Venable v. State, C. 301, 1 O. C. D. 165.

When on the trial of an indictment for libel, at the close of the evidence the ntion of the court is called to certain rules which should be applied by the in the consideration of the evidence in the resolution of difficult and intricate stions arising in the case, and when certain remarks of the court have been le regarding them which may tend to mislead the jury as to its duty and province, s the duty of the court to give the jury, at least, some general rules to guide n determining such matters, although the defendant's requests for charges on points are so formulated as to be inaccurate, and are properly refused. Boyle tate, 6 C. C. 164, 3 O. C. D. 397.

Where a person is indicted for murder in the first degree, and on the trial e is evidence tending to show that the deceased came to his death from the harge of a pistol at the time in the hands of the defendant, but which pistol was intentionally pointed or aimed at the deceased by the defendant, or voluntarily harged by him, but that these facts were entirely accidental, and without fault he part of the defendant, and while he was not in the commission of an unlawful it is the duty of the court, on the request of the defendant, to charge the that if such a state of the case was shown, he can not be found guilty of any nse under said indictment. Williamson v. State, 2 C. C. 292, 1 O. C. D. 492.

The fact from which incriminating inferences are sought to be drawn, should ully proved. Rose v. State, 13 C. C. 342, 7 O. C. D. 226; affirmed, 37 Bull. 352.

As to the right of the court to recall from the jury room certain written charges n to the jury, see Hurley v. State, 4 C. C. 425, 2 O. C. D. 630.

It is not error for a justice to submit a case to the jury without a charge where s not requested to make one. Myer v. State, 10 C. C. 226, 6 O. C. D. 477.

An instruction to the effect that accused is not guilty of causing the death a woman through an attempted miscarriage if he honestly believed that there a dead foetus in her uterus; and he administered chloroform as an anaesthetic order to operate to remove such foetus, even if she died as a result of such esthetic, would not be erroneous because of failure to provide that the honest ef of the accused must have been based on reasonable grounds, since if there uld be a finding that the intent of the accused was not to destroy foetal life but relieve the patient of a foetus already dead, there would be a failure on the part the state to prove intent, and the accused would be entitled to an acquittal.

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Tippie v. State, 1 O. A. R. 13, 15 C. C. (N.S.) 522, 24 O. C. D. 203 (modified and affirmed, 89 O. S. 35).

An instruction, in a prosecution for furnishing intoxicating liquor to a minor, that if the liquors were not furnished by the proprietor but by the bartender, unless the proprietor consented to such furnishing by the bartender, then no conviction could be had and the burden is on the state to show that the furnishing was consented to by the proprietor, is properly refused when the court charges generally that it is immaterial whether the furnishing was by the proprietor or the bartender, unless it appears that such liquors were furnished without the authority and against the instructions of the proprietor given to the agent in good faith, and also, that the burden of proving defendant guilty is upon the state. Harris v. State, 1 O. A. R. 323, 20 C. C. (N.S.) 356, 24 O. C. D. 187.

In a trial for perjury it is not error for the trial judge to charge the jury as follows: "It is proper for the court to remind you that the issue in this case is to the defendant of so grave a nature, and to the public safety and the proper administration of justice of such vital importance, that upon your part there should be no error. In considering the rights of the accused, if you should be convinced in your judgment beyond a reasonable doubt of his guilt as charged in the indictment, do not forget that by each acquittal of a guilty person the safeguard erected by society for its protection is weakened. By the non-enforcement of penalties affixed to criminal acts, contempt for the law is bred among the kind of persons that it is intended to restrain." Ruch v. State, 2 O. A. R. 150, 18 C. C. (N.S.) 391, 24 O. C. D. 675.

Upon the trial of a criminal case it is not error for the court to refuse to instruct the jury, at the request of the defendant, upon matters of law before the argument begins. Morrow v. State, 1 O. A. R. 95, 15 C. C. (N.S.) 561, 24 O. C. D. 140; Umbenhauser v. State, 4 C. C. 378, 2 O. C. D. 606 (affirmed, 23 W. L. B. 176). Morrow v. State is affirmed with opinion, 90 O. S. 202.

Where reliance for conviction is placed on circumstantial evidence, the jury should be instructed that the facts and circumstances upon which the theory of guilt is based should be shown beyond a reasonable doubt, and when taken together must be so convincing as to be irreconcilable with the claim of innocence and admit of no other hypothesis than the guilt of the accused. Carter v. State, 4 O. A. R. 193, 22 C. C. (N.S.) 154.

It is not error to charge that the word body, as used in G. C. § 13043, is not restricted in meaning to the human trunk excluding the head and limbs, but is synonymous with the words "person" or "human being." Franklin v. State, 14 C. C. (N.S.) 253, 23 O. C. D. 21.

A charge to the effect that the jury must find certain facts beyond a reasonable doubt, which omits the alternative that if they do not find such facts beyond a reasonable doubt they must acquit the defendant, is not stated in the best way, but if it appears from the whole charge that the jury could not have been misled, but must have understood the charge, not as an instruction to convict, but as defining the terms upon which they could convict and requiring them to acquit if they do not find the facts as stated in such charge, the reviewing court will not reverse because of such charge. Smith v. State, 14 C. C. (N.S.) 257, 24 O. C. D. 661.

If the question of entrapment becomes material in a criminal case, it is not error for the court to charge, "In considering the law with reference to the rights of the state to ferret out and detect crime, the law makes a distinction, as a matter of public policy, between measures used purely to lure and entrap a person into crime on the part of the state, itself, from those necessary for the detection and

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nishment of some corrupt and criminal private purpose on the one hand, and an ifice used to detect public officials suspected of being engaged in the solicitation l acceptance of bribes which vitally affect the public welfare." Andrews v. State, C. C. (N.S.) 241, 23 O. C. D. 564 (leave to file petition in error refused, 57 Bull.).

In a trial of one indicted for murder in the second degree, it is error to rge that the jury should either find the accused guilty of murder in the second ree or manslaughter or acquit him, for this excludes the two lesser offenses of ault and battery and assault alone. Duranec v. State, 16 C. C. (N.S.) 20.

In a prosecution for selling adulterated maple syrup, a charge that the accused l a package containing "a half pint, more or less," is sufficient, as the offense sists in selling a package, whether great or small. Scanlon v. State, 16 C. C. S.) 115.

In a trial for arson where the indictment charged the accused with burning the perty of "B. Mirsky," and the evidence showed that it was owned by "Harry sky," it is not error for the court to charge that if the jury found that the son named in the indictment as "B. Mirsky" was the same person as the "Harry sky" who owned the building, the variance would not be fatal. Berman v. State, C. C. (N.S.) 106, 25 O. C. D. 386 (affirmed, without opinion, 81 O. S. 508).

In a criminal case it is not error to charge "The defendant is entitled to the sideration and judgment of every member of the jury on the question of his lt. It is your duty as jurors to consider the evidence as a jury, with the sole in view of the ascertainment of the question which you are called upon to ermine. It is your duty to reason together upon the evidence. It is the duty of h one of you to apply your best reason and judgment, and your best conscience the evidence, in order that you may discharge the obligation which you have umed under your oath." Geer v. State, 16 C. C. (N.S.) 151.

A charge to the effect, "If you believe beyond a reasonable doubt that time osed between the fight on the hill and the killing, what was done in the previous rrel will have little weight in this case. When a quarrel is over and the parties e separated, no one has a right to attack another to avenge himself or for any son arising out of a quarrel that has passed and gone. In so far as the law is cerned, it is entirely a separate occurrence, separate and apart, if time has osed," is erroneous because it cuts off all weight to be given to the previous rrel, upon the mere lapse of time. John v. State, 16 C. C. (N.S.) 316.

Where defendant relies upon the fact that the first spouse had been absent more than five years next preceding her second marriage, without being known e living, there is no burden upon her to show that she used due diligence to ascer- the whereabouts of her first husband, and in so charging the court erred. Harms State, 16 C. C. (N.S.) 443.

In a criminal prosecution for pocket picking, it is error to charge "The defendant ms that he was intoxicated at the time, and, on that subject, I charge you: that le drunkenness is not an excuse for crime, yet, if the defendant was so drunk to destroy his reasoning powers, and thus not know what he was doing, that is a t that may be considered by you, together with all the other facts and circum- nces in the case for the purpose of determining the intention of the defendant the time;" since the jury not merely might consider such facts, but were required acquit the defendant if they found such facts to exist. A judgment of guilty will be reversed, however, for such error, if it appears from the defendant's own timony that he knew what he was doing. Cole v. State, 17 C. C. (N.S.) 106.

The fact that a charge is more favorable to the accused than it should have n does not justify the reviewing court in reversing a judgment which is rendered

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upon a verdict against such accused since such error is not prejudicial to suc accused. Townsend v. State, 17 C. C. (N.S.) 380, 25 O. C. D. 408.

In a prosecution for stabbing with intent to wound, a charge as follows, "A ma put upon trial here charged with crime, starts out in the trial with the presumptio in his favor that he is not guilty. The presumption must be overcome by evidenc satisfying the jury to a reasonable certainty of guilt. You do not have to b absolutely certain of guilt in order to find a party guilty; you must be satisfie in such degree that you have no reason to doubt his guilt. Your minds must b so satisfied of his guilt that your conscience would be satisfied with a verdict o guilty; that you would feel you have not made a mistake. You could not b absolutely certain, that is not required. If you have an honest difficulty afte you have considered the evidence, an honest, conscientious difficulty in believin the defendant guilty, then you ought not to convict. If you are reasonably certai of his guilt, then you ought to convict. You ought not to have any hesitation abou convicting if the evidence warrants it. You ought not to convict unless the evidenc does warrant it," while not commended, is not, as a whole, incorrect. Campanari v. State, 17 C. C. (N.S.) 388.

In a prosecution against a father for failing to support minor children wh were awarded to the custody of their mother when she obtained a divorce from th accused for his aggression, it is not error to refuse to charge, "Before you ca find the defendant guilty in this case, you must find from the evidence, beyond reasonable doubt, that the defendant was able by reason of his having mean or of his ability to work and earn money, to provide said children with proper hom care, food or clothing, and that he has knowingly and wilfully refused or neglecte so to do, after knowledge or notice to him, from the mother or person having th custody of said children to do so;" whether such charge is correct in the abstrac or not, since it does not deal with the guilt or innocence of the accused and woul not have aided the jury. Moore v. State, 18 C. C. (N.S.) 482, 24 O. C. D. 487.

In the prosecution of a druggist for violating the municipal local option la (95 v. 87), it is not sufficient to charge that he sold intoxicating liquor upon written prescription and that the sale was not made by him in good faith fo medicinal purposes, without alleging that it was known to him that the liquo would be used for other than the purpose the prescription called for, or some othe fact tending to show that it was not sold in good faith. Rowland v. State, 18 C. C (N.S.) 598 (affirmed, without opinion, 80 O. S. 711).

In a prosecution under G. C. § 12428, against a father for cruelly and unlawfull punishing his child, it is not proper to charge the jury that the father is the judg as to the mode and severity of the punishment and can not be found guilty for erro in judgment, even if the punishment was excessive, nor unless the jury shoul find he was prompted by malice and ill-will toward the child. Mohr v. State, 1 C. C. (N.S.) 43.

One who is indicted under G. C. § 12416 for putting out or destroying the ey of another with intent to maim or disfigure, can not be found guilty unless the jur finds from the evidence beyond a reasonable doubt that an eye of the injured part was destroyed or put out as a result of the alleged assault. Accordingly, a charg in which the court undertakes to restate the elements of the crime is erroneous i the court omits the requirement of finding beyond a reasonable doubt that suc eye was destroyed or put out; and such error is ground for reversal, even though i

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her part of the charge all the elements of such crime were stated correctly. nley v. State, 19 C. C. (N.S.) 526, 26 O. C. D. 209.

In a larceny case the value of a substituted article left in the place of the stolen can not be considered to reduce the offense from grand to petit larceny; failure to charge that if the difference in value of the articles was less than ty-five dollars, the defendants could not be convicted of grand larceny is not r. Taddeo v. State, 22 C. C. (N.S.) 281.

In a trial of one indicted for first degree murder it is not prejudicial error on part of the court to fail to charge the jury that they might find defendant guilty ssault and battery, where under the charge as given the jury might have found defendant guilty of a crime of lesser degree than that of which they did in fact him guilty. Murray v. State, 23 C. C. (N.S.) 508.

A plea of self-defense admits the killing by the defendant but seeks to avoid legal consequences by pleading and showing justification. If a defendant does admit the killing, but stands on his plea of not guilty and challenges the state rove beyond a reasonable doubt that the killing was committed by him, an ruction to the effect that there was some evidence that the killing was by the ndant, but he claimed he was justified under the doctrine of self-defense, is ly prejudicial, since it leaves the jury no option but to find that the killing the act of the defendant, their task being only to determine whether it was elf-defense; and such a charge shifts the burden of the proof and compels the ndant to prove his innocence by a preponderance of the evidence. Goings v. e, 24 C. C. (N.S.) 145.

The use of public funds by the official in whose custody they are placed by does not constitute an offense, unless there is a defalcation on the part of such al; and where the testimony discloses that all funds so used by the defendant al have been returned, and there is no defalcation as to any part thereof, a on will be granted to instruct a verdict for the defendant. State v. Gunkelman, . P. (N.S.) 665, 23 O. D. 535 (exceptions overruled, 87 O. S. 488).

In a prosecution of the president of a trust company for wilful misapplication s funds, with intent to defraud and injure the company, by loaning said funds out proper security to a corporation which proved to be insolvent, a motion at the conclusion of the evidence for the state to instruct the jury to return a ict of not guilty, where the evidence fails to show that the defendant made of the loans complained of or misapplied any of the moneys or funds of the , or any intent on his part to injure or defraud the bank, but on the contrary he was justified by the information upon which he acted in believing that the s were good and would be repaid, and complete exoneration of any part he may had in the matter is found in the action in due course of the executive com- ee in authorizing the making of these loans and the approval by the board of tors of said loans after they were made. State v. Cox, 16 N. P. (N.S.) 513, 25 . 556 (exceptions overruled, 91 O. S. 141).

The failure of the court to instruct the jury that certain record evidence was itted as to one defendant only can not be assigned as error where no objection eto was made on behalf of the other defendants. Foster v. United States, 178 165, 101 C. C. A. 485, 9 O. L. R. 66.

The following charge defines direct and circumstantial evidence in a criminal ecution for larceny: "The question whether the defendant stole the property ediately from the possession of the owner may be shown by direct or circum-

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stantial evidence. Direct evidence is that related by a witness of facts, the existence of which he has actual knowledge; while circumstantial evidence is proof of collateral facts and circumstances having relation to and connection with the main fact involved in the transaction. For example, in the crime of larceny, the act of stealing property from the owner is the main fact, constituting the criminal act, while the fact of having possession of the property recently stolen may be collateral to such act of theft, and connected therewith, provided such possession appears to have been obtained and maintained under such circumstances and in such way and manner as to indicate, or show that the one having possession did not obtain it honestly and innocently. If it should be made to appear by competent evidence that such possession was not obtained honestly or innocently, that the defendant gave a false account of his possession, then the jury may deduce or infer from such conduct, acts or declarations of the defendant, the fact that the accused himself stole the property from the owner, even though there may be no evidence which shows the actual act of removing the property from the possession of the owner. The jury must therefore consider all the evidence of the loss of the property by the owner in the light of the evidence touching the possession of the same by the defendant, the nature of the property, and the disposition made of it by the defendant." State v. Radcliffe, 26 O. D. 147.

The following charge states the effect of evidence tending to show possession of property recently stolen in a criminal prosecution for larceny: "Where property shown to have been recently stolen comes into the possession of one who is charged with its theft, the jury will consider all the facts and circumstances connected with such possession, the length of time of such possession in relation to the time of the loss of the property by its owner, the acts and declarations of the one accused of the theft, the defendant, its disposition by him and his explanation of how he came into possession or concerning the disposition of the property by him. If the jury should believe and find from the evidence that the defendant has made a reasonable and satisfactory explanation of how he came into possession; that he has made a reasonable and satisfactory explanation in connection with such possession and the disposition of the same by him; if the jury believes that such explanation by the defendant is consistent with his innocence of the theft of the property, then you should acquit him of the crime of larceny, provided such possession and his explanations raise a reasonable doubt in the minds of the jury concerning his guilt. But if on the other hand, the jury finds and have an abiding conviction from all the evidence that the defendant has failed to give a reasonable and satisfactory account and explanation of how he came into possession, as well as of the disposition made of the property by him; or, if the jury find that the defendant gave a false account and explanation of either how he came into possession or concerning the disposition made of the property by him, which is inconsistent with his innocence but consistent with his guilt, in such event the jury would be warranted in presuming and inferring, as a matter of fact, that he is guilty of the larceny of the property. If such be the opinion and finding of the jury; if the jury have an abiding conviction of the guilt of the defendant, based upon such possession, his explanations, declarations, and admissions made by him in reference to the possession and disposition of the property, and from the circumstances and surrounding conditions appearing in the evidence, then the jury would be warranted in finding him guilty of the crime charged against him and you should in such event find him guilty." State v. Radcliffe, 26 O. D. 147.

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For a charge on the subject of soliciting a bribe under G. C. § 12823, see State v. , 56 Bull. 273.

For a charge as to homicide and aiders and abettors, see State v. Williams, V. L. B. 155 (affirmed by circuit court, 11 C. C. (N.S.) 4, 20 O. C. D. 342, leave le petition in error refused, 53 W. L. B. 28).

For a charge on the subject of criminal homicide, see State v. Simi, 56 Bull. 297.

For a charge in a case of felonious homicide involving the liability of an ssory before the fact, see State v. Diehl, 57 Bull. 26.

Trial.—Except in cases of impeachment, and cases arising in the army and y, or in the militia when in actual service in time of war or public danger, in cases of petit larceny and other inferior offenses, no person shall be held nswer for a capital, or otherwise infamous crime, unless on presentment or etment of a grand jury. In any trial, in any court, the party accused shall llowed to appear and defend in person and with counsel; to demand the nature cause of the accusation against him, and to have a copy thereof; to meet the nesses face to face, and to have compulsory process to procure the attendance vitnesses in his behalf, and a speedy public trial by an impartial jury of the nty or district, in which the offense is alleged to have been committed; nor l any person be compelled, in any criminal case, to be a witness against self, or be twice put in jeopardy for the same offense. Const. Art I, § 10.

Where pending a trial upon a criminal prosecution the accused being on bail, onds, it is legal to proceed with the case, and to receive a verdict of guilty in absence. Fight v. State, 7 O. (pt. 1), 180.

It is not error to omit giving notice to the prisoner's counsel, that he may be ent when the verdict is to be delivered by the jury. Sutcliffe v. State, 18 O.

Where the defendant is on bail, it is not error to receive a verdict in his ntary absence. Wilson v. State, 2 O. S. 319.

The counsel of the accused are entitled to a reasonable opportunity to be pres- at the receiving of the verdict. But where the court, after the jury agreed, had courthouse bell rung in pursuance of an announcement at the time the jury red and also counsel called and a reasonable time had elasped for counsel to ear, all was done by the court that the defendant or his counsel had a right to ect. Weaver v. State, 24 O. S. 584. Crusen v. State, 10 O. S. 259.

What is included in "trial," see Wagner v. State, 42 O. S. 537; Palmer v. State, O. S. 596.

Where the judge presiding at the trial of a prisoner for murder sends to the on their request, in the absence of the prisoner, a copy of the statutes of state, calling their attention to the three sections relating to homicide. Held, it was an exercise of discretion on the part of the judge which did not udice the prisoner, and furnished no ground for the reversal of the judgment. dolfo v. State, 11 O. S. 114.

It is not error, where the record book has been read to the jury, if the rt refuse to make an order to send it with them to their room of deliberation. urn v. State, 7 O. (pt. 1) 212.

A court or judge has no right to communicate with the jury respecting the rge of the court after the jury has retired, except publicly, and in the presence the accused. To do this is good cause for a new trial. Kirk v. State, 14 O. 511.

The judge of the court of common pleas is an essential part of the court, and

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his presence during the trial is necessary to its proper conduct. He should be all times within sight and hearing of the proceedings, so that he will retain contr of all that transpires during the trial and can instantly exert his authority wh it is required. This rule applies especially to the trial of a criminal case. Mil v. State, 73 O. S. 195.

Where it is shown that a judge during a trial of one accused of murder is far absent, and for such length of time, as to prevent his control of the condu of the trial while the prosecuting attorney is making the last argument to the ju and during such absence that officer, in the hearing of the jury, comments up matters not in evidence and extraneous to the case, which are calculated to wo serious prejudice to the defendant, and accuses the defendant's counsel of condu apart from the proceedings of the trial of a highly unprofessional or criminal cha acter, such prejudice will be presumed as to require a reversal of the judgme Miller v. State, 73 O. S. 195.

Where a statute defining a crime and prescribing the punishment therefor repealed at any time before final judgment in a prosecution thereunder, such rep forecloses all further proceedings in such prosecution unless a contrary intent pears in the repealing statute; but when such repeal occurs after final judgment does not in any respect vacate or modify such judgment, or render it invalid. re Kline, 70 O. S. 25.

A defendant in a criminal case is entitled to have allowed by the county co missioners and paid out of the county treasury, the legal fees paid by him to t official stenographer or assistant for a necessary transcript of the shorthand no taken on the trial of the cause. Clinton County v. Martin, 65 O. S. 287.

An order made by the court of common pleas during the trial of an indictme for a felony, to the effect that in view of the testimony expected to be given witnesses next to be called the court would continue the trial during the taking the testimony of witnesses likely to give immoral or obscene testimony in the sm court room, that the sheriff should admit no one to said room except the ju defendant's counsel, and members of the bar and newspaper men, and one oth person, a witness for defendant, exceeds the power of the court in the premises, a its enforcement is a denial to the defendant of his constitutional right to a pub trial. State v. Hensley, 75 O. S. 255.

An indictment charging, in separate counts, shooting with intent to kill a shooting with intent to wound includes the lesser offenses of assault and batte and upon the trial of the accused upon such an indictment the jury may find t accused not guilty of shooting with intent to kill and not guilty of shooting wi intent to wound, but guilty of assault and battery or an assault only. State McCoy, 88 O. S. 447.

A mistrial should not be ordered in a cause simply because some error h intervened. The error must prejudicially affect the merits of the case and t substantial rights of one or both of the parties, and this is as true of the tempora absence of the judge as any other department from due process of law during t trial of a cause. Tingue v. State, 90 O. S. 368.

Where upon a trial for murder in the second degree, after the evidence is introduced, the trial judge becomes incapacitated to further continue in the ca and the prosecution is adjourned for eighteen days, part of the time from day day by the sheriff, and at other times by another judge of the same subdivisio during which adjournment the jury is permitted to separate, going to differe

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arts of the county; at the end of the eighteen days another judge of the same dis-ict hears the arguments, prepares the charge and delivers it to the jury; passes pon the motion for a new trial, and sentences the prisoner; and it does not affirm-tively appear by the record that the new judge read any portion of the evidence, either that the jury had been in any manner tampered with.

Held. That there was irregularity in the proceedings of the court and jury, nd that the judgment should be reversed, and a new trial granted. Mason v. tate, 5 C. C. N. S. 113, 16 O. C. D. 535.

The court may order the trial to proceed unless it would be a manifest abuse discretion; for it is the duty of the judge to see that a speedy trial is had, so far as it is consonant with the rights of the defendant. Haas v. State, 13 C. 424, 7 O. C. D. 509 (affirmed, 37 W. L. B. 212).

The accused in a felony case has the right to be present when any proceedings re taken in his trial, such as the calling out of the jury to inquire as to its rogress. Bennett v. State, 10 C. C. 84, 4 O. C. D. 129.

It is error for the court, in a felony case, to seek to hasten the jury's delib-rations for his own convenience, even by merely inquiring as to its progress ith a statement that his train will leave in a few minutes. Id.

The constitutional right of a person accused of felony "to appear and defend in erson and with counsel," can not be denied, or its exercise unreasonably abridged, ut the court may limit the argument of the accused or his counsel, provided that e accused is not thereby deprived of a fair trial. Dille v. State, 34 O. S. 617.

General Code § 1548, does not make it mandatory upon a trial judge to provide e defense in a criminal case with an official stenographer, and a judgment of onviction will not be reversed for failure so to do, where it appears there was o official stenographer available at the time, and no claim is made that the verdict against the weight of the evidence, or that the defendant was not proved guilty eyond a reasonable doubt, or that any manifest injury resulted to the defendant rough failure to have a stenographer in attendance. Austin v. State, 2 O. A. R. 3, 18 C. C. (N.S.) 607, 24 O. C. D. 603.

When the ground has been properly laid for impeaching a witness it is not ror to permit a stenographer who took his testimony before the grand jury to ate that certain questions were there asked the witness and answers given by im and the stenographer may refresh his memory from his written notes of such estimony. John v. State, 16 C. C. (N.S.) 316.

Misconduct on the part of the jury can not be proven by the affidavit of one of e jurors. Murray v. State, 23 C. C. (N.S.) 508 (citing Farrer v. State, 2 O. S. 54; ulett v. Barnett, 10 O. S. 459; Kent v. State, 42 O. S. 426).

Misconduct on the part of a jury can not be based upon the unsupported affidavit one who obtained his information from a member of the jury. Andrews v. State, 5 C. C. (N.S.) 241, 23 O. C. D. 564.

It is not an abuse of discretion for a trial judge to keep a jury out for forty ours in an important case and then send them back to their room with an admonition s to the importance to all concerned that they should agree upon a verdict. Andrews State, 15 C. C. (N.S.) 241, 23 O. C. D. 564.

If an improper remark by the court in the presence of the jury is relied upon s reversible error, the record must show that the jury was then present, or some embers thereof. Townsend v. State, 17 C. C. (N.S.) 380, 25 O. C. D. 408.

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Where a defendant in a criminal case states that he does not desire couns and attempts to conduct the defense himself, and it becomes evident that he mentally incapable of so doing, or understanding the nature of the defense, becomes the duty of the court to stop the trial, and appoint counsel to defend; a where this was not done, and the trial resulted in the conviction and sentence of t defendant, a reviewing court will reverse the judgment on the ground that virtual there was no trial. Stephenson v. State, 4 O. A. R. 128, 21 C. C. (N.S.) 287.

When a criminal case is pending and a jury has been impaneled, it is contempt court to represent to one of the jurors that the prosecuting attorney wishes to ha a personal interview with him, to induce such juror to go to the residence of t prosecuting attorney late at night, and to have a number of witnesses so arrang that they could see such juror enter the house of the prosecuting attorney. Gol v. State, 19 C. C. (N.S.) 317.

Where a statute makes a second and subsequent offense punishable by imprisc ment, this provision is not so intimately connected and allied with a previo provision making a first offense punishable by fine only that the two can not separated, and it is not error for a magistrate to refuse a trial by jury to one charg with a first offense. Ames v. State, 11 N. P. (N.S.) 385, 22 O. D. 92.

Sec. 13676. When accused may be tried in his absence.

A person indicted for a misdemeanor, upon request in writing su scribed by him and entered on the journal, may be tried in his absen or by the court. No other person shall be tried unless personally pre ent, but if a person indicted escape or forfeit his recognizance, aft the jury is sworn, the trial shall proceed and the verdict be receiv and recorded. If the offense charged is a misdemeanor, judgment a sentence shall be pronounced as if he were personally present; an if a felony, the case shall be continued until the accused appears court, or is retaken. (R. S. § 7301; 66 v. 310, § 152.)

Presence of accused.—Where, pending a trial upon a criminal prosecuti the accused, being on trial, absconds, it is legal to proceed with the case, and receive a verdict of guilty in his absence. Fight v. State, 7 O. 181.

On the trial of an indictment for a criminal offense, and at the return of t verdict, it is the right of the accused to be present; and if prevented by imprisc ment or other improper means, he is entitled to a new trial. Rose v. State, 20 O. 3 Sargent v. State, 11 O. 472.

Where the defendant is on bail, it is not error to receive a verdict in l voluntary absence. Wilson v. State, 2 O. S. 319.

The counsel of the accused are entitled to a reasonable opportunity to present at the receiving of the verdict. But where the court, after the jury agre had the courthouse bell rung, in pursuance of an announcement made at the ti the jury retired, and also counsel called, and a reasonable time elapsed for coun to appear, all was done by the court that the defendant or his counsel had a rig to expect. Weaver v. State, 24 O. S. 584; Crusen v. State, 10 O. S. 258; Sutcli v. State, 18 O. 469.

On the trial of a felony, it is error to proceed, at any stage of the trial, duri the enforced absence of the accused, save only in the matter of the secret delibe

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on of the jury, and perhaps in the hearing of motions after verdict and before dgment. Where the jury, on the trial of a felony, have retired to consider their verdict, it is error for the court, on the return of the jury into court, to ain instruct them as to the law of the case in the absence of the accused, who then in jail under the order of the court. Such irregularity is not cured by the esence of defendant's counsel at the giving of such additional instructions. Nor ll a reviewing court inquire into the correctness of such additional instructions. nes v. State, 26 O. S. 208.

It is no ground for the reversal of a judgment, that a motion for a new trial as made, argued, and overruled in the absence of the prisoner, where no objection as made till after sentence. Griffin v. State, 34 O. S. 299.

The hearing of a motion for a new trial is not a part of the trial. The presence the hearing of such motion of one convicted of a crime is not necessary and it is ror for the trial judge to refuse to hear and determine same on account of the nvict's absence. Armstrong v. State, 15 C. C. (N.S.) 368, 24 O. C. D. 384.

It is not error for the jury to make a view of the place where a felony is aimed to have been committed, under the order of the court and in charge of the eriff, where the privilege is awarded the accused to accompany the jury, though may refuse to attend the view. Blythe v. State, 47 O. S. 234.

Where an order is made by the court, on motion of the prosecuting attorney, der § 7283, that the jury view the premises where the alleged crime was comtted, in charge of the sheriff and a person appointed by the court to point out ch premises, it is error to permit such view in the absence of the accused and ainst his objection. Hotelling v. State, 3 C. C. 630, 2 O. C. D. 366.

Where a person, accused of violating a village ordinance, has been arrested, ought before the village mayor, the case adjourned for trial to a certain hour a future day, and the accused, after giving bail for his appearance for trial at e time fixed, is liberated, and fails to appear at the hour fixed for his trial, such ayor is without jurisdiction to proceed with the trial until the accused appears, d should the mayor, in the absence of the accused, proceed to try, convict, and tence him, such conviction and sentence will be void. Truman v. Walton, 59 O. 517.

Section 7301 of the Revised Statutes, which provides, "that a person indicted for nisdemeanor may, upon his request in writing subscribed by him and entered on journal, be tried in his absence or by the court," does not make it obligatory on the court to try the accused without a jury. Ickes v. State, 63 O. S. 549.

On the trial of a felony, the accused has a right to be present in court when any ceeding, of whatever nature, except the secret deliberations of the jury are taken his case.

The accused is entitled to have the deliberations of the jury continue undisbed and uninterfered with, and it is error for the judge, during the enforced sence of the accused, to hold a conversation with the jury which might influence ir verdict and prevent the defendant from having a fair trial in the case. Bent v. State, 10 C. C. 84, 4 O. C. D. 129.

If, after the trial of a felony case has begun and before it is finished, the accused ent himself, the trial may continue, after forfeiture of the recognizance, and the dict be received and recorded, but sentence cannot be pronounced until the used is in court, or is retaken. Lieblang v. State, 18 C. C. (N.S.) 179.

Trial by jury.—Defendant not entitled as a matter of right to have cause ed by the court, instead of a jury. Ickes v. State, 16 C. C. 31, 8 O. C. D. 442.

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Sections 4 and 10 of Art. I of the constitution which guarantee public tria jury, do not apply to prosecutions under ordinances which authorize a penalty by only upon a summary conviction under a police regulation or of an ordinance fo immoral practice prohibited by law (in this case suffering a gambling device, to- a slot machine) although imprisonment as a means of enforcing the payment of fine is authorized. Fletcher v. State, 18 C. C. 674, 7 O. C. D. 316.

The police court of Cincinnati has the power to hear and finally determi charge of a misdemeanor committed within the city or within four miles the without the intervention of a jury, when in the language of the statute, "the cused is not entitled to a jury," and there is no provision by any statute that case where the penalty affixed to the offense is only a fine, the accused is in court entitled to a trial by a jury. Fletcher v. State, 18 C. C. 674, 7 O. C. D.

Upon the trial of an issue raised by a plea of not guilty, in the higher gr of crime, it is not in the power of the accused to waive a trial by jury, and consent, submit to have the facts found by the court, so as to authorize a judgment and sentence upon such finding. Williams & Haynes v. State, 12 O. S.

The entering of a plea of guilty is a waiver of a trial by a jury.

A mayor having complete jurisdiction in cases of misdemeanor, a ple guilty entered before him is to be given the same effect as in the courts of hi jurisdiction. (Complaint under R. S. 7020, G. C. § 13024.) Hillier v. State, 5 N. S. 245, 16 O. C. D. 562.

Section 7301 of the Revised Statutes (G. C. § 13676), which provides "that a son indicted for a misdemeanor may, upon his request in writing subscribed by and entered on the journal, be tried in his absence or by the court," does not ma obligatory upon the court to try the accused without a jury. Icks v. State O. S. 549.

By force of § 1817, Revised Statutes (G. C. § 4528), a mayor of a city in w there is no police court, has final jurisdiction to hear and determine any pros tion for a misdemeanor where the accused is not entitled to a trial by jury, a is not the mayor's duty, in such case, to require the accused to enter into re nizance to appear in a higher court, although the complaint is not by the p injured. State v. Borham, 72 O. S. 358.

For proceedings when the defendant pleads guilty to a charge of murder § 13692.

Entry trial of accused in his absence.

(Title.) Now comes the defendant E F by his attorney and presents to court his written request to be put upon trial in his absence (or to be trie the court) said request being in words as follows: (copy the request in full) the said request is hereby granted by the court.

Sec. 13677. Separate trial on joint indictments.

When two or more persons are jointly indicted for a felony, application to the court for that purpose, each shall be tried separat (R. S. § 7302; 66 v. 310, § 153.)

Indictment against two, only one put on trial. It is not error, if it can ju be inferred from the record that an order for a separate trial was made, th it does not appear in form upon the record. Hess v. State, 5 O. 1.

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A motion by one of two persons, jointly indicted, for a change of venue as to lone, necessarily involves and includes a motion for a separate trial; the grant- f such motion necessarily involves and includes the granting of a separate also. Brown v. State, 18 O. S. 496.

After an order for separate trials, the cases are to be considered, for most ses, as separate and distinct indictments. Brown v. State, 18 O. S. 509.

The right of separate trials, where two or more are jointly indicted for a , may be waived by the parties. Such waiver may be made in express words, may be implied from the conduct of the parties. It will be implied where arties proceed without objection to impanel a jury and exercise the right llenge. Hullinger *et al* v. State, 25 O. S. 441.

Where separate trials are awarded to parties jointly indicted, each is a com- t witness for the state upon the trial of the other; and the fact of being ed as an accomplice only goes to his credibility as a witness, and does not sarily render his testimony incredible. Mitchell v. State, 21 C. C. 25; 11 O. C. 6.

After an order for separate trials, the cases are to be regarded for most pur- as separate and distinct indictments. Noland v. State, 19 O. 131; Allen v. , 10 O. S. 287.

Where an indictment against two, charged one with burning, and the other procuring the burning of the building, it is not error for the court to award ate trials, on motion of the prosecuting attorney. Allen v. State, 10 O. S. 287.

Where two persons are jointly indicted for the same offense, neither the court he jury engaged in the trial of the second defendant is concluded by the fact a verdict of not guilty was returned in the case of the first defendant. Studer ate, 9 C. C. N. S. 185; 19 O. C. D. 33. Affirmed 74 O. S. 519.

Entry—Separate trials ordered.

Title.)

On application to the court by the defendant, E F, the court orders that a ate trial be had of each defendant herein.

13678. Mistake discovered in charging proper offense.

f it appear before verdict that a mistake has been made in charg- he proper offense in the indictment, the jury may be discharged out prejudice to the prosecution, and the accused, if there is good to detain him, may be recognized to appear at the next term of , or, in default thereof, committed to jail. In such case the court recognize the witnesses for the state to appear at the same time and y. (R. S. § 7303; 66 v. 310, §§ 154, 155.)

This section constitutes the presiding judge, in effect, a committing magis- so as to prevent a failure of justice with respect to cases where a crime is by the evidence to have been committed by the accused, but he cannot be cted of any offense under the indictment upon which he is on trial; and, stently with the constitution (art. I, § 10), the provision can not have a more rehensive meaning. Mitchell v. State, 42 O. S. 383.

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Where the evidence is excluded from the jury, upon a motion of the defen in a criminal trial, on the ground that the indictment charges no offense ag him, the jury should be discharged without rendering a verdict, there bein offense of which to acquit him, and no évidence for them to consider. Sta Brown, 47 O. S. 102.

Where the indictment charges larceny of the property of John E., and evidence shows that Joseph E. was the owner, a proper case arises for the applic of this section. Horner v. State, 8 C. C. (N.S.) 441, 18 O. C. D. 568.

Entry—Indictment quashed and prisoner detained.

(Title.) Indictment for ———.

On motion, and it appearing to the court that a mistake has been mad charging the proper offense in the indictment against this defendant, the sai dictment is hereby quashed. But it appearing that there is good cause to d the said defendant in custody, it is ordered that he be held to bail in the su ——— dollars for his appearance on the first day of the next term of this cou answer the charge against him; and in default thereof that he be committed t custody of the sheriff.

(If the recognizance is at once given, add:)

And thereupon the defendant, with J H as his surety, entered into recogni in accordance with the above order.

Also the following named witnesses were recognized in the several amo and with the sureties severally set opposite their names, for their appear before the said court at the next term thereof, viz.:

Name of Witness.	Amount of Recog.	Surety.
L R.	$300.	S T.
etc.	etc.	etc.

Sec. 13679. Acquittal because of insanity.

When a person tried upon an indictment for an offense is acqui on the sole ground that he was insane, and proceedings are had th after as provided by law, he shall be committed to the Lima state pital. This section shall not be in force and effect until the Lima s hospital is ready for the reception of inmates as certified to the co by the governor and secretary of state. (98 v. 239, 241, §§ 14, R. S. 721-14-25.)

Where a defendant in a criminal case states that he does not desire counsel attempts to conduct the defense himself, and it becomes evident that he is men incapable of so doing, or understanding the nature of the defense, it become duty of the court to stop the trial, and appoint counsel to defend; and where was not done and the trial resulted in the conviction and sentence of the defen a reviewing court will reverse the judgment on the ground that virtually there no trial. Stephenson v. State, 4 O. A. R. 128, 21 C. C. (N.S.) 287.

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EXCEPTIONS.

. 13680. Bill of exceptions by defendant in criminal trial.

If the defendant feels himself aggrieved by a decision of the court, may present his bill of exceptions thereto, which the court shall n, and it shall be made a part of the record, and have like force and ect as in civil cases. If exceptions be taken to the decision of the rt overruling a motion for a new trial, because the verdict is not tained by sufficient evidence or is contrary to law, the bill of excep- ns must contain all the evidence; and the taking of all bills of excep- ns shall be governed by the rules established in civil cases. The bill exceptions shall be filed with the pleadings and papers, but not re- ded unless the court for good reasons shall so order; and evidence st not be recorded. (R. S. § 7304; 99 v. 387; 84 v. 44, 45; 66 v. , § 156; S. & C. 1188.)

Application of section.—Sections 7304 to 7308, inclusive, Revised Statutes ly to trial courts—courts of original jurisdiction—and do not authorize excep- s to decisions in a district court reviewing a cause on proceedings on error to court of common pleas. State v. Myers, 15 W. L. B. 283.

This section does not apply to prosecutions before the mayor. Bradner v. ndetisch, 15 C. C. 32, 8 O. C. D. 122.

For the taking of exceptions before a justice of the peace, see G. C. § 10359, and sick v. State, 15 C. C. 371, 8 O. C. D. 306 (affirmed, 62 O. S. 283).

Bills of exceptions before a mayor, or in a police court, are governed by the s in civil cases in the court of common pleas. Germantown v. Basore, 22 C. C. 12 O. C. D. 500.

In a prosecution for the violation of a municipal ordinance, a municipal court take judicial notice of the existence of the ordinance. Strauss v. Conneaut, 3 C. (N.S.) 445, 13 O. C. D. 320.

A court of review occupies the same relation to the ordinance as the municipal rt, and where one against whom a penalty has been assessed for the violation n ordinance seeks to have the judgment reversed, the reviewing court will also e judicial notice of the ordinance under which the conviction was had. Strauss onneaut, 3 C. C. (N.S.) 445, 13 O. C. D. 320.

Bill of exceptions.—In order to justify the reversal of a judgment on error, record must affirmatively show, not only that error intervened, but that it was he prejudice of the party seeking to take advantage. Scovern v. State, 6 O. S.

When a question is asked which is objected to, and the objection sustained, in ing an exception there should be a statement of what it is proposed to prove, ch must be something material, and the rejection of which, as evidence, would prejudicial to the party excepting. Gandolfo v. State, 11 O. S. 114.

Where a question put to a witness is rejected by the court as incompetent, in er to make the rejection a ground of error, it must appear what was proposed be proven, and that it was something, the rejection whereof would be prejudicial he plaintiff in error. Hummel v. State, 17 O. S. 628.

In order to justify the reversal of a judgment on the ground that the court w refused to permit certain evidence to be given, it is incumbent on the party

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complaining to show affirmatively that he was entitled to offer such evidence for some purpose, stated in or manifest from the record. Hamilton v. State, 34 O. S. 82; Oviatt v. State, 19 O. S. 573.

A refusal to permit a witness to answer certain questions on direct examination is not reversible error, unless the record shows what the party who offers such witness expects his answer to such question to be. State v. Griffith, 18 N. P. (N.S.) 161 (affirmed by court of appeals).

A bill of exceptions in a criminal case taken under the Revised Statutes §§ 5302, 7304, can not be regarded as a part of the record, unless it appears from the journal of the term at which the cause was tried and terminated that such bill was signed during that term or within thirty days thereafter. Kerr v. State, 3[illegible] O. S. 614.

Where a reviewing court is asked to review on the weight of evidence a question of forgery, the alleged forged paper and the genuine signatures introduced should, in some manner, be made a part of the bill of exceptions. Breck et al v. State, 4 C. C. 161, 2 O. C. D. 477.

Under the section to which this is an amendment, and which required that the bill of exceptions must be sealed, as well as signed. Held, that since the amendment to § 4 (80 v. 79), abolishing private seals, it was not necessary to the validity of the bill of exceptions that it be sealed by the trial judge. Venable v. State, [illegible] C. C. 301, 1 O. C. D. 165.

An application for a mandamus, to compel a judge to sign a bill of exceptions should be accompanied by the bill that was tendered to him for his allowance. Where the answer in such case shows that the defendant is willing to sign a true bill, but denies that the bill presented is true, the writ must be refused, as the right to determine as to the truth of exceptions is vested in the judge to whom it is presented (Ohio, on Rel. of Atkins v. Todd, et al., 4 Ohio, 351, approved and followed). Creagel v. Meeker, 22 O. S. 207.

Where the answer to an alternative writ to compel the defendant to sign the bill of exceptions shows that the defendant is willing to sign a true bill, but alleges that the bill as presented is not true, a peremptory writ will be refused. State, ex rel., v. Bickham, 4 C. C. 246, 2 O. C. D. 526.

It is for the court to determine whether a bill of exceptions presented for his signature is a true bill or not. State, ex rel., v. Bickham, 4 C. C. 246, 2 O. C. D. 526.

To entitle one to a peremptory writ or mandamus against a judge refusing to sign a bill of exceptions, the petition must allege facts sufficient to show that the officer against whom the writ is prayed, has omitted a manifest duty. It must also be averred that facts which would justify the omission complained of do not exist. State, ex rel., v. Bickham, 4 C. C. 246, 2 O. C. D. 526.

Where a court agrees to sign a bill of exceptions as soon as it is prepared, but adjourns sine die without having signed the same, the signing may be done within the statutory time after the end of said term. Stickels, ex rel., v. O'Neal, 3 C. C. 393, 2 O. C. D. 222.

The bill of exceptions to be presented to opposing counsel must be complete in form, and where it contains only a part of the evidence, may be refused by him. State, ex rel., v. Evans, 12 C. C. 245, 5 O. C. D. 339.

Mere bulk or weight of exhibits does not excuse a failure to attach them to a bill of exceptions. State v. Hinkelman, 13 C. C. (N.S.) 321, 22 O. C. D. 1 (affirmed without report, 83 O. S. 446).

In error proceedings based on the ground that the verdict is not sustained by sufficient evidence, the record must show affirmatively that all the evidence is set forth in the bill of exceptions. Cantwell v. State, 18 O. S. 477.

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If exhibits are detached from the bill of exceptions by order of the trial court, ıe reviewing court will nevertheless consider them. Goode v. State, 17 C. C. (N.S.) 5.

If bottles which are introduced in evidence are labeled in a manner which is not t out clearly in the bill of exceptions, and it does not appear in what action they ere introduced in evidence, or in what court such action was being heard, and there a dispute as to the manner in which such bottles were attached to the bill of ceptions, the court will not regard the bill of exceptions as complete. Cohen v. ate, 16 C. C. (N.S.) 178.

A certificate to a bill of exceptions that all the evidence introduced or offered trial is contained therein, does not show that all the evidence offered or introduced a motion for new trial is contained therein. Accordingly it will not be presumed at an affidavit filed by the defeated party setting forth improper conduct on the rt of the attorney for the prevailing party was uncontradicted if the court has fused to grant a new trial on the ground of such misconduct; but the reviewing urt will assume that it may have been shown by affidavit or otherwise that the nguage which was complained of was not in fact used. Berman v. State, 16 C. C. N.S.) 106, 25 O. C. D. 386 (affirmed, 81 O. S. 508).

If a bill of exceptions shows that a package was originally attached thereto, and ring is found upon the bill which indicates that such attachment was actually made, e reviewing court will not refuse to consider the bill, although such package has en inadverently taken from the bill. Scanlon v. State, 16 C. C. (N.S.) 115.

In a prosecution under the code of criminal procedure, a judgment will not be versed for error in overruling a motion for a new trial, on the ground that the rdict is not sustained by sufficient evidence, unless the record shows affirmatively at all the evidence is set forth in the bill of exceptions. Cantwell v. State, 18 S. 477.

When a bill of exceptions refers to an exhibit attached to and made part ereof only as containing the testimony admitted at the trial, the reviewing court nnot consider any statement in said exhibit purporting to recite rulings, admitng or excluding evidence made by the court before which the case was tried. unn v. State, 23 O. S. 167.

Where exceptions are taken to a general charge given by the court to the jury, ıless the party excepting points out, at the time the exception is taken, specifically, e part or proposition of the charge excepted to, or the grounds of his exception, reviewing court is not bound to take notice of the exceptions. Adams v. State, 25 S. 584, 29 O. S. 412.

Before a paper purporting to be a bill of exceptions can be regarded by a reewing court, upon error, as part of the record, it must appear from the record, ıtside of such paper, that a bill of exceptions was, in due time, tendered to and lowed, signed, and sealed by the court, and made part of the record; and the ıper in question must be identified, with reasonable certainty, as the bill of exceptons which was thus made part of the record. Hill v. Bassett, 27 O. S. 597.

A reviewing court can not consider a complaint by the State that the trial ıdge erred in taking from the jury the question of a defendant's guilt of the rime of robbery, and the permitting of a verdict to be returned of guilty of pocket icking, where no cross-petition in error has been filed by the State. Brown v. tate, 2 C. C. (N.S.) 409, 15 O. C. D. 130 (affirmed by S. C. 1 O. L. R. 15).

If the court in a criminal proceeding states in its charge to the jury what dmissions were made by defendant in open court, and defendant excepts to the harge as a whole except as to the statement concerning the admissions, the ccuracy of such statement of the court in such charge concerning the admissions an not be considered by the reviewing court. State v. Vancak, 90 O. S. 211.

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If it appears that the trial court charged the jury upon the question of assault, and the bill of exceptions does not set forth the charge in full, it will be presumed that the trial court defined the offense of assault so clearly that the jury understood its essential elements. Snyder v. State, 92 O. S. 167.

If the bill of exceptions does not show the evidence upon which the trial court based its instructions to the jury, it must be presumed that the proceedings in the trial court were regular, if the charge in question could be justified by any possible condition of the evidence. Snyder v. State, 92 O. S. 167.

Where a statute defining a crime and prescribing the punishment therefor is repealed at any time before final judgment in a prosecution thereunder, such repeal forecloses all further proceedings in such prosecution unless a contrary intent appears in the repealing statute; but when such repeal occurs after final judgment it does not in any respect vacate or modify such judgment, or render it invalid. In re Kline, 70 O. S. 25.

Section 6723, Revised Statutes (G. C. § 12270), which fixes a limitation of four months for the commencement of proceedings to reverse, vacate or modify a judgment or final order, does not govern the time within which proceedings may be commenced to reverse a sentence and judgment in a criminal case, and there being no provision of statute fixing such limitation, a motion on the part of the accused presented to this court for leave to file a petition in error twenty-two months after the rendition of the judgment complained of, will not be refused on the ground that it is not filed in time. Miller v. State, 73 O. S. 195.

A bill of exceptions presented by the prosecuting attorney to the trial judge under § 13681, General Code, must, in conformity with the requirement of the preceding section and of the civil code, be filed within forty days of the rendition of the judgment in the case in which the bill is taken. State v. Cox, 91 O. S. 141.

The period within which a bill of exceptions must be prepared and filed in a criminal case is the same as that allowed in civil actions. The time limitation for filing a petition in error to reverse a judgment in a civil action has no application to a criminal action. Smith v. State, 20 C. C. (N.S.) 606, 24 O. C. D. 520, 2 O. A. R. 334.

Allegations of fact made in a motion for a new trial, not supported by the record nor made part thereof by bill of exceptions, can not be considered upon proceedings in error to reverse the judgment. Waggoner v. State, 30 O. S. 575.

An erroneous instruction to the jury is not ground for the reversal of the judgment, where it clearly appears from the record that the party objecting thereto was not prejudiced thereby. Berry v. State, 31 O. S. 219.

A reviewing court on error will not regard any matter, purporting to be part of the record, which is not a proper matter of record. Therefore, exhibits and affidavits, given in evidence on the hearing of a motion, which are not legitimately a part of the record, can not be considered by a reviewing court on error to the decision of the motion, though they may have been recorded by the clerk as part of the case, unless they are properly brought upon the record by bill of exceptions. Schultz v. State, 32 O. S. 276; Goldsmith v. State, 30 O. S. 208; Young v. State, 23 O. S. 577.

The ruling in Lemmon v. State, 77 Ohio St. 427, does not apply to counties which do not contain a workhouse. State v. Wirick, 81 O. S. 343.

A bill of exceptions certified to contain all of the evidence which was offered and given on the trial, and found to be true, and allowed and signed as a part of the record, by the trial judge, is in the record. The presumption is that notice was given to opposite counsel, and that all preliminary steps were complied with although the record is silent as to those matters. State v. Wirick, 81 O. S. 343.

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Objections which do not affect jurisdiction of the subject matter, and which were made in the intermediate court of appellate jurisdiction, will not be enter-d in this court. State v. Wirick, 81 O. S. 343.

The circuit court has no jurisdiction to hear a petition in error filed by the in a criminal case to reverse the judgment of the court of common pleas, arging the accused. State v. Hance, 4 C. C. (N.S.) 541, 16 O. C. D. 273.

Improper remarks of the counsel in addressing the jury must be brought into record by the certificate of the trial judge. They can not be introduced by avit. State v. Young, 77 O. S. 529.

When a juror is challenged for incompetency, and a motion for a new trial is on that ground, the record must show affirmatively that it contains all the nce submitted to the court below on that question. Cooper v. State, 16 O. S.

f an improper remark by the court in the presence of the jury is relied upon versible error, the record must show that the jury was then present, or some bers thereof. Townsend v. State, 17 C. C. (N.S.) 380, 25 O. C. D. 408.

n order that affidavits used on a motion for a new trial may be considered by iewing court, there must be a certificate of the trial judge that the affidavits estion were all the evidence introduced on the hearing of the motion. Berman ate, 16 C. C. (N.S.) 106, 25 O. C. D. 386 (affirmed, 81 O. S. 508).

f no exception is taken to an order overruling a motion for a new trial, and quently another motion for a new trial on the ground of newly-discovered nce is filed, and such second motion is overruled and exception taken thereto, ircuit court considers the entire case including the rules made at the trial which then excepted to by the accused. McLaughlin v. State, 20 C. C. (N.S.) 492.

The journal is the proper evidence of the sentence actually imposed in a criminal and it can not be contradicted by a bill of exceptions Santo v. State, 17 C. C.) 110.

One seeking the reversal of a judgment of the common pleas court in a prosecution misdemeanor should attach to his petition in error a transcript of the complete d. Champion v. State, 9 C. C. 315, 6 O. C. D. 82, 2 O. D. 171.

Bill of exceptions.

(Title. Indictment for ———.

Be it remembered that one the ——— day of ———, A. D. 19—, being one of lays of the ——— term in said year of the court of common pleas of ——— y, and being the day on which this cause was set for trial, and upon the g of the case for trial, the defendant objected to being put on his trial on that for the reason that, etc. (set out), but the court decided, etc., and notwith-ling the objection of the defendant put him immediately on trial. To which ion of the court, and to his action in the premises, the defendant then excepted.

Be it remembered that afterward, on the day above mentioned, at the trial of aid defendant, while a jury was being impaneled to try the issue in said case, J L was called by the sheriff, and was sworn and examined touching his fications to sit as a juror upon the trial of said cause; whereupon he testified llows (set out testimony).

And the above was all the testimony of said J L, whereupon challenge for was tendered by the defendant, which the court overruled, and defendant, is counsel, at the time excepted.

Be it remembered that afterward, on the day above mentioned, before the jury been impaneled and sworn, the defendant challenged the array of the jury re-ed by the sheriff for the reason that, etc. (set out reason). And the defend-in support of his challenge called, etc. (set out). The prosecuting attorney

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then called, etc. (set out), which was all the testimony adduced upon occa of the challenge above recited. And thereupon the court decided, etc., and ruled said challenge, to which ruling the defendant then excepted.

Be it remembered that on the trial of this action the state, to maintain issue on its part, called as a witness

1. A R,

who, being duly sworn, testified as follows:

(Give a full statement of the testimony in narrative form, showing the di cross, and re-examination, or set out categorically the questions and answer deemed best.)

And at this point in the examination, the prosecuting attorney asked the lowing question of the witness, A R, to-wit:

(State question.)

And the defendant objecting to said question, the court overruled the o tion, and the defendant at the same time excepted.

And thereupon the defendant moved the court to rule out so much of the timony of A R as (set forth part), and the court, on consideration, refused motion, to which the defendant at the time excepted.

And thereupon the state rested its case.

And the defendant, to maintain the issue on his part, called as a witness

1. G H,

who, being duly sworn, testified as follows:

(Give a full statement of the testimony in narrative form, showing the d cross, and re-examination, or set out categorically the questions and answer deemed best.

And at this point in the examination the defendant proposing to prove etc., asked the following question of the witness, G H, to-wit:

(State question.)

And the state objecting to said question, the court sustained the obje and the defendant at the time excepted to said ruling of the court.

And thereupon the state moved the court to rule out so much of the mony of G H as (set forth part), and the court, on consideration, granted motion, and the defendant, at the time, excepted to said ruling of the court

And the defendant, further to maintain the issue on his part, offered in dence, and read the deposition of M N, which is hereto attached and made a hereof, marked "Exhibit A,"

The state objected, when the same was offered, to the admission of the fo ing portion of the deposition, to-wit:

"Question, etc. Answer, etc." (or specify in any way the part objected which objection was sustained by the court, and said testimony ruled out, to ruling of the court and rejection of testimony the said defendant, at the excepted.

And further the defendant offered the testimony of N L to prove that offered to produce evidence tending to prove that), etc. (state the facts which testimony tends to prove, or set forth the testimony), and the state objecting court refused to allow him to testify in the case (or, refused to receive the said dence), to which ruling of the court the defendant, at the time, excepted.

And thereupon the defendant rested.

And thereupon the state, further to maintain, etc.

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And thereupon the state rested.

And the foregoing is all the evidence given or offered by either side upon the trial of the case.

And at the close of the testimony, and after the conclusion of the argument of the respective counsel (or, before the argument), the defendant requested the court to give the following charges to the jury, each of which the court gave, to-wit:

(Set out in full.)

And at the same time the defendant asked the court to give the following charges to the jury, each of which the court refused to give; to each of which refusals the defendant then and there excepted, to-wit:

(Set out in full.)

And at the same time the defendant asked the court to give the following charge to the jury:

(Set out charge.)

Which charge the court refused to give, but gave it modified as follows:

(Set out charge.)

To which refusal to give the charge as asked, and to which charge, as given, the defendant, at the time, excepted.

And at the same time the state asked the court to give the following charge to the jury:

(Set out charge.)

To the giving of which charge the defendant objected, but the court overruled said objection and gave said charge to the jury; to which giving of said charge and overruling of said objection the defendant, at the time, excepted.

And the court then charged the jury as is set forth in the copy thereof hereto attached and made part hereof, marked "Exhibit E."

And the defendant, at the time, excepted to said charge as follows:

To the portion of the third paragraph thereof, etc. (set out specifically the matter referred to), on the ground that, etc.

Said "Exhibit E," and the said special charges given as hereinbefore stated, comprise all the charges of the court as given to the jury at said trial.

Whereupon the jury retired for deliberation, and returned a verdict against the defendant, as appears of record in the cause; and the defendant thereafter filed a motion in arrest of the said judgment and for a new trial, and the same was argued by counsel and submitted to the court, which, upon consideration, overruled the same, to which the defendant, at the time, excepted.

In behalf of this, and several other exceptions and matters herein specifically enumerated, the defendant by his counsel, on the ——— day of ———, A. D., 19—, files this, his bill of exceptions in said cause with the clerk of the court of common pleas of ——— county, Ohio, being within forty days after the overruling of the motion for a new trial herein.

———,
Attorneys for Defendant.

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This bill of exceptions filed by me in said cause in the court of common ple of ——— county, Ohio, on the ——— day of ———, A. D. 19—.

———,
Clerk of the court of common pleas ——— county, Ohio.

On the ——— day of ———, A. D. 19—, I, the clerk of the court of comm pleas of ——— county, Ohio, notified ———, prosecuting attorney of — county, of the filing of this bill of exceptions, said notice being given in writi and a true copy of said notice being on file now in my office, the said notice havi been given as aforesaid, on the same day that this bill of exceptions was filed me.

———,
Clerk of the court of common pleas ——— county, Ohio.

This bill of exceptions approved the ——— day of ———, A. D., 19—, and co sent to immediate transmission to the trial judge.

———,
Prosecuting Attorney.

This bill of exceptions, together with all objections and amendments fil hereto, transmitted by me to the trial judge, Hon. ———, on the ——— day ———, A. D., 19—, being not less than ten days nor more than fifteen days aft the date of giving notice aforesaid to counsel for the state, of the filing of this b of exceptions.

———,
Clerk of the court of common pleas ——— county, Ohio.

This bill of exceptions, together with all objections and amendments fil thereto, received before me on the ——— day of ———, 19—, from the hand the clerk of the court of common pleas of ——— county, Ohio.

———,
Judge of the court of common pleas, ——— county, Ohio, and trial judge of th case.

And, this bill of exceptions being fully inspected and found to be true a correct in every respect, is allowed and signed on the ——— day of ———, A. 19—, being within five days of its receipt by me, and the same is immediatel transmitted by me, together with all objections and amendments filed thereto, the ——— day of ———, A. D. 19—, to the office of the clerk of the court common pleas, ——— county, Ohio.

And, the said defendant by counsel requesting it, the same is hereby ordere to be made a part of the record in this case, but not to be spread upon the journa according to the statute in such case made and provided.

In witness whereof, I have hereunto set my hand this ——— day of — A. D. 19—.

———,
Judge of the court of common pleas, ——— county, Ohio, and trial judge of thi case.

This bill of exceptions, together with all objections and amendments file thereto, received from the hand of the Judge of the court of common pleas an trial judge of this case, ——— county, Ohio, on the ——— day of ———, A. D. 19—

———,
Clerk of the court of common pleas, ——— county, Ohio.

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Filed in the court of common pleas ——— county, Ohio, on the said last mentioned date.

———,
Clerk of the court of common pleas, ——— county, Ohio.

Filed in the circuit court, ——— county, Ohio, on the ——— day of ——, 19—.

———,
Clerk of the circuit court, ——— county, Ohio.

Entry—Order allowing bill of exceptions.

(Title.) Indictment for ———.

Now comes the defendant and presents to the court his certain bill of exceptions herein, which, being found by the court to be true, is allowed, signed, and, on motion, is hereby made part of the record of this case.

Entry—Exceptions withdrawn.

(Title.) Indictment for ———.

Now comes the defendant and, by leave of court, withdraws from the files his exceptions heretofore taken herein.

13681. Exceptions by prosecuting attorney or attorney-general.

The prosecuting attorney or the attorney-general may except to a decision of the court and may present a bill of exceptions thereto, which the court shall sign, and it shall be made a part of the record. (R. S. § 7305; 66 v. 312, § 157; S. & S. 614; 84 v. 45; 98 v. 33.)

Sections 7304 to 7308, inclusive, of Revised Statutes (G. C. §§ 13680 to 13684), refer to trial courts—courts of original jurisdiction—and do not authorize exceptions to decisions in a district court reviewing a cause on proceedings on error to the court of common pleas. State v. Myers, 15 W. L. B. 283.

The purpose of the bill of exceptions by a prosecuting attorney to the decision of the court is not to obtain a reversal of the judgment of the court in the case in which the bill is taken; its purpose is simply to determine the law to govern in a similar case. State v. Granville, 45 O. S. 264; State v. Simmons, 49 O. S. 305, 309. Cited, State v. Lewis, 50 O. S. 179, 184; State v. Bailey, 50 O. S. 636, 638.

Exceptions may be taken by the prosecuting attorney to a decision of the court of common pleas reversing a magistrate. State v. Ruedy, 57 O. S. 224.

A decision of a trial judge on a question as to the materiality of variance between the allegation of an indictment and the evidence offered in its support may be the subject of an exception by the prosecuting attorney with a view to obtaining a decision which shall determine a law for the government of similar cases. State v. Schler, 57 O. S. 95.

As a general rule an application by a prosecuting attorney for leave to file a bill of exceptions to the decisions of the court in a criminal case before the prosecution is ended will be overruled. State v. Dickerson, 73 O. S. 193.

Under G. C. § 13764, which provides that whenever a court superior to the trial court renders judgment adverse to the state in a criminal case or proceeding, error may be prosecuted to reverse such judgment in the next higher court by the prosecuting attorney or by the attorney-general, it is not necessary that leave of the same court should be obtained by the prosecuting attorney or the attorney-general.

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to file the petition in error which that section authorized. State v. Gaskin 128 (for later report in same case, see State v. Gaskins, 88 O. S. 550).

This section apparently relates to proceedings instituted in the supr and not to those instituted in the court of appeals. In any event, the a will be denied until the pending case is terminated and a final judgment therein. Morrow v. State, 1 O. A. R. 95, 15 C. C. (N.S.) 561, 24 O. C. D. 140 State v. Morrow, 90 O. S. 202).

A reviewing court can not consider a complaint by the state that the t erred in taking from the jury the question of a defendant's guilt of the robbery, and the permitting of a verdict to be returned of guilty of pocke where no cross-petition in error has been filed by the state. Brown v. Stat (N.S.) 409, 15 O. C. D. 130 (motion to file petition in error overruled, 1 O.

Evidence which tends to show a conspiracy on the part of the defer others to fabricate a defense to an indictment for bribery, is competent in c fact that such evidence is of a circumstantial nature and not direct, does not incompetent, where it otherwise conforms to the established rules of e cases of conspiracy. State v. Huffman, 86 O. S. 229.

A bill of exceptions presented by the prosecuting attorney to the t under § 13681, General Code, must, in conformity with the requiremer preceding section and of the civil code, be filed within forty days of the re the judgment in the case in which the bill is taken. State v. Cox, 91 O. S

The jurisdiction conferred by this and the following sections to de question of law is proper appellate jurisdiction, although the procedure is extent ex parte, and though the judgment of the supreme court can not rights of the parties under the judgment of the trial court. State v. Ca O. S. 214.

The state can not have a new trial, even though the verdict of the not go to the guilt or innocence of the accused, but its remedy is by excepti purpose of determining the law for future cases. State v. Thatcher, 12 O. I

Sec. 13682. Proceedings upon the exceptions of prosecuting or attorney-general.

The prosecuting attorney or attorney-general may prese bill of exceptions to the supreme court and apply for permissio it with the clerk thereof for the decision of such court upon th presented therein. Prior thereto he shall give reasonable notic judge, who presided at the trial in which such bill was taker purpose to make such application. If the court allows the b filed, the judge shall appoint some competent attorney to a case against the prosecuting attorney or attorney-general who ceive for his services a fee not exceeding one hundred dolla fixed by the judge, and paid out of the treasury of the county the bill was taken. (R. S. § 7306; 66 v. 310, § 158; S. & S. 61 187; 98 v. 34.)

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A decision of the trial judge on a question as to the materiality of a vari- between an allegation of an indictment and the evidence offered in its sup- may be reversed, if erroneous and prejudicial to the accused, and it may be subject of an exception by the prosecuting attorney with a view of obtaining cision on which shall determine the law of the government of similar cases. e v. Buechler, 57 O. S. 95.

A decision of the court of common pleas reversing a sentence by a justice of peace may be the subject of an exception by the prosecuting attorney for the ose of presenting it to the supreme court to obtain a decision for the govern- of similar cases. State v. Ruedy, 57 O. S. 224.

As a general rule, an application by a prosecuting attorney for leave to file l of exceptions to the decisions of the court in a criminal case before the prosecu- is ended will be overruled. State v. Dickerson, 73 O. S. 193.

Sections 13682, 13683 and 13684, General Code, confer appellate jurisdiction the supreme court in criminal cases to the extent and for the purposes specified ese sections. State v. Cox, 87 O. S. 313.

Under the constitution of this state, as amended September 3, 1912, the supreme has neither original nor appellate jurisdiction in cases of misdemeanors unless cases involve questions arising under the constitution of the United States or is state, or questions of public or great general interest, or in cases the records hich are certified to this court by the judges of the court of appeals under the isions of § 6, of Art. IV, of the constitution. State v. Mansfield, 89 O. S. 20.

The supreme court acquires both original and appellate jurisdiction directly from onstitution of the state as amended September 3, 1912. The general assembly o power or authority to limit or increase that jurisdiction. State v. Mansfield, S. 20.

Sections 13682, 13683 and 13684, General Code, in so far as they purport to confer the supreme court appellate jurisdiction in misdemeanors, are inconsistent with onstitution as amended and therefore have no further force or effect. The ques- of the jurisdiction of this court under the provisions of these sections in felony is not involved in this case and is not here decided. State v. Mansfield, 89 . 20.

General Code §§ 13681 to 13684 are neither inconsistent with nor repugnant to ew constitution, and are thereby preserved in full force and virtue as to felony not as conferring jurisdiction but as prescribing a rule of procedure and tice as to certain appellate jurisdiction now controlled by the new constitution. e v. Cameron, 89 O. S. 214.

Entry—Attorney appointed to argue case, etc.

(Title.) Indictment for ———.

The prosecuting attorney having given notice of his intention to apply for ission to present his certain bill of exceptions herein to the supreme court, and supreme court having allowed such bill to be filed, G P, one of the attorneys of court, is hereby appointed to argue said case against the prosecuting attorney re said court.

13683. Duty of the supreme court.

If the supreme court is of the opinion that the questions pre- ed should be decided upon, it shall allow the bill of exceptions to be

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filed, and render a decision thereon. (R. S. § 7307; 66 v. 31, S. & S. 615.)

Neither Art. IV, § 1, nor Art. IV, § 2, of the Ohio constitution render a proceeding upon the exceptions of the prosecuting attorney or attorney g to obtain a decision of the supreme court upon the points presented by a exceptions, although a judgment in favor of the accused can not be reversed proceeding. State v. Cox, 87 O. S. 313.

Under the constitution of this state as amended September 3, 1912, the s court has neither original nor appellate jurisdiction in cases of misdemeanors such cases involve questions arising under the constitution of the United St of this state, or questions of public or great general interest, or in cases the of which are certified to this court by the judges of the court of appeals un provisions of § 6, of Art. IV, of the constitution. State v. Mansfield, 89 O. S.

General Code §§ 13681 to 13684 are neither inconsistent with nor repugn the new constitution, and are thereby preserved in full force and virtue as to cases not as conferring jurisdiction but as prescribing a rule of procedure an tice as to certain appellate jurisdiction now controlled by the new constitution. v. Cameron, 89 O. S. 214.

Sec. 13684. Effect of the decision of the supreme court.

The judgment of the court in the case in which the bill was shall not be reversed nor affected; but the decision of the su court shall determine the law to govern in a similar case. (§ 7308; 66 v. 311, § 160; S. & S. 615.

After a verdict of guilty, and judgment reversed on account of error proceedings, the prisoner is not protected from a second trial before a jury provision in the bill of rights that "the accused shall not be twice put in je for the same offense." Sutcliffe v. State, 18 O. S. 469. This case is cited a tinguished in Hines v. State, 24 O. S. 134, 140.

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ACQUITTAL WITHOUT TRIAL.

Sec. 13685. Prisoner indicted, when to be discharged.

A person shall not be detained in jail without a trial o indictment for a continuous period of more than two terms afte

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est and commitment thereon, or, if he was in jail at the time the ictment was found, more than two terms after the term at which indictment was presented. He shall be discharged unless a con- uance is had on his motion or the delay is caused by his act. S. § 7309; 73 v. 249, § 161.)

When the defendant is discharged, under § 161 or § 162 of the Criminal e of 1869 (66 v. 311), on the ground that he has not been brought to trial ain the time therein limited, the order of discharge is to be regarded not as a e temporary release of the prisoner from confinement, but as a final judgment the cause, and a bar to all subsequent prosecutions for the same offense. *Ex te* James McGehan, 22 O. S. 442.

Where the court erroneously refuses to grant such order of discharge, and ead thereof remands the prisoner to jail, and continues the cause, the order anding the prisoner to jail, so long as it remains unreversed, is a valid and l authority to the sheriff for retaining the prisoner in custody, and the order not be reviewed and reversed, or the prisoner discharged, by a proceeding in *eas corpus* before another tribunal. *Ib.*

The records of the court of common pleas import absolute verity, and where riminal cause is continued without disclosing the ground, the court will presume continuance was upon sufficient ground, in the absence of any thing in the ord to the contrary, notwithstanding the provisions of this section and § 7311, the fact that the cause had already been continued three times on motion of state. Johnson v. State, 42 O. S. 207.

Where the defendant is in jail under indictment, and the cause is continued er § 7309, Revised Statutes, on motion of the state, at the second term after h imprisonment, because of the absence of material witnesses, and the cause not be tried at the succeeding term for want of time, the court is not deprived power to continue the cause again, notwithstanding the defendant asks to discharged under that and § 7311, the amendment to the latter section, as ginally enacted in 1869, simply denying power to grant to the state two con- uances by reason of the absence of witnesses. *Ib.*

This is not a statute of limitations, and its violation is not jurisdictional. *parte* McKnight, 3 N. P. 255; 4 O. D. 284.

A release by the probate court on *habeas corpus* proceedings because he had ained in jail more than two terms does not prevent a second prosecution. *Id.*

Two continuances for want of time to try the case, and one for want of ma- ial evidence, do not entitle the accused to a discharge. Corbett v. State, 5 C. C. ; 3 O. C. D. 79.

Does not apply to one who is in the penitentiary. Edit., 37 W. L. B. 424.

After the lapse of three or more terms of court from the return of an indictment s a matter of discretion on the part of the trial judge whether a motion to be charged for failure to prosecute shall be granted. State v. Brown, 15 N. P. (N.S.)

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Sec. 13686. Persons indicted and held to bail, when to be discharg

A person shall not be held by recognizance to answer an indictm without trial, for a period of more than three terms, not includin term at which a recognizance was first taken thereon, if taken in t time. He shall be discharged unless a continuance is had on his mot or the delay is caused by his act, or there is not time to try him at s third term in which case he must be brought to trial at the next term be discharged. (R. S. § 7310; 66 v. 311, § 162.)

Where an application is made for a discharge under § 162 of the Criminal of 1869 (66 v. 311) at any term of the court, on the ground that the defen who had given bail for his appearance, was not brought to trial before the en the third term after the indictment was found, such application should be ref if at such term the state is ready for trial, although the cause can not be trie want of time at such term. Erwin v. State, 29 O. S. 186.

See Corbett v. State, 5 C. C. 155; 3 O. C. D. 79.

Does not apply to one who is in the penitentiary. Edit., 37 W. L. B. 424.

Sec. 13687. Proceedings on application for discharge.

When application is made for the discharge of a defendant u either of the next two preceding sections, if the court is satisfied there is material evidence for the state which can not then be had, reasonable effort has been made to procure it and that there is ground to believe that such evidence can be had at the next term, cause may be continued, and the prisoner remanded or admitted to If he be not brought to trial at the next term thereafter he shall the discharged. (R. S. § 7311; 66 v. 311, § 163.)

The plaintiff in error was indicted at the September term, 1887, of the of common pleas. The record shows that he entered into a recognizance fo appearance at the next term, and that the case was continued generally. action was had at the succeeding term. At the third term, being the April 1888, he was surrendered by his sureties and committed to jail, and the case continued for want of time for trial. At the September term, 1888, a like was made. The accused thereupon applied for his discharge under §§ 7309-1 the Revised Statutes, which application was overruled. At the January term, the case was continued for want of material evidence. At that term two app tions of the accused for his discharge were denied. He was tried and convicte the succeeding (April) term, 1889, at which term two similar applications of plaintiff in error that he be discharged on the ground that he had not been bro to trial within the time required by the statute were disallowed. *Held*, tha error was committed by the trial court in overruling these several applicat Corbett v. State, 5 C. C. 155; 3 O. C. D. 79.

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Under § 163 of the Criminal Code of 1869 (66 v. 311), it was held that if, when ch application is made, whether during the time so limited, or at a subsequent term the court, the state is ready to proceed with the trial, or makes the showing re-ired by the section for a continuance, the accused will not be entitled to be dis-arged. Ex parte James McGehan, 22 O. S. 442.

A continuance will not be twice granted to the state for the absence of witnesses, t the court may continue the cause when it has not time to try it. Johnson v. ate, 42 O. S. 207.

After the lapse of three or more terms of court from the return of an indictment is a matter of discretion on the part of the trial judge whether a motion to be dis-arged for failure to prosecute shall be granted. State v. Brown, 15 N. P. (N.S.) 1.

Entry—Prisoner discharged if not tried, etc.

(Title.) Indictment for ———.

The said defendant herein E F having been indicted (state the time and term court when) and not having been brought to trial and the continuance or delay said cause not having been caused by his act it is hereby ordered that he be and is discharged.

Entry—Same when recognized.

(Title.) Indictment for ———.

The defendant herein not having been brought to trial, and this being the third rm of the court after his indictment, he is hereby discharged from his recog-zance.

Application for discharge refused.

(Title.) Indictment for ———.

This cause being heard on the application of the defendant for discharge on e indictment against him, and the court being satisfied that there is material evi-nce on the part of the state, to be had at the next term, and which can not now, reasonable diligence, be had, the said application is refused; and the said de-ndant is remanded to the custody of the sheriff.

(Or, admitted to bail for his appearance to answer said charge at the next term this court.)

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CHAPTER XI.

VERDICT, JUDGMENT AND PROCEEDINGS THEREON.

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VERDICT.

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VERDICT.

Sec. 13688. Conduct of jury after case submitted.

When a case is finally submitted, the jurors must be kept together a convenient place, under the charge of an officer, until they agree u

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erdict or are discharged by the court. Such officer shall not permit ommunication to be made to them, nor make any himself, except to if they have agreed upon a verdict, unless by order of the court; shall he communicate to any person, before the verdict is delivered, matter in relation to their deliberations. If the jurors are permitted separate during the trial, they shall be admonished, by the court, not converse with, nor permit themselves to be addressed by, any person, to listen to any conversation on the subject of the trial, nor form or ress an opinion thereon, until the same is finally submitted to them. S. § 7312; 68 v. 3, § 1.)

Keeping jurors together.—The court may, in the exercise of a sound retion, direct the jury to seal up their verdict, and separate, and bring it in, pen court, should they agree when the court is not in session. State v. Engle, O. 490.

Whether the jury shall be permitted to separate during the progress of trial of a criminal case, is a matter of sound discretion with the court trying case, and the exercise of his discretion cannot be questioned on error. Davis tate, 15 O. 72.

After the jury have retired to consider of their verdict in a criminal case, should be kept together until they agree on a verdict, or are discharged. It is r in the court to permit them to separate and go to their meals without super- on, during their deliberation, even though counsel for the defendant consent to separation. Parker v. State, 18 O. S. 88.

The separation of a juror from his fellows, in the trial of a criminal case, after as been finally committed to them, and before they have agreed upon a verdict, the purpose of obtaining and drinking intoxicating liquors, when not explained shown to be excusable, is such misconduct of the juror as will entitle the oner to a new trial. Weis v. State, 22 O. S. 486.

The separation of a jury, in the trial of a criminal case, after they have ed upon a verdict, is left to the discretion of the court, and where, on such ration, by discretion of the court, nothing is done to the prejudice of the de- ant, it is not such misconduct of the jury as necessarily to require the granting new trial. Bainbridge v. State, 30 O. S. 264.

Under the first section of chapter 7 of the criminal code (70 Ohio L. 352), the t, in its discretion, may permit the jury in a capital case to separate during progress of the trial, and before the case is finally submitted to them. Bergin tate, 31 O. S. 111.

A motion for an order to keep the jury together during the trial is addressed he sound discretion of the court, and cannot be reviewed upon error unless there clear abuse of discretion. Hotelling v. State, 3 C. C. 630; 2 O. C. D. 366.

The provisions of the 164th section of the criminal code that "in the trial elonies the jury shall not be permitted to separate after being sworn, until dis- rged by the court", is mandatory, and it is error to overrule a motion for a new l by the defendant, on the ground that the jury were permitted to separate, re it appears that the jury were permitted to separate after they were sworn he trial of a felony, and were permitted to mingle with the community without supervision of the proper officer; even though such separation was allowed by the t, with the consent of the defendant. Cantwell v. State, 18 O. S. 477.

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A cause is finally submitted to the jury, within the meaning of § 7312, Rev Statutes (G. C. § 13688), at such time as the court directs the jury to enter u its deliberations, and not necessarily at the conclusion of the charge of the c to the jury. State v. Ferrell, 69 O. S. 521.

Where, at the conclusion of the reading of the court's charge the ju are permitted to separate for the purpose of the noon meal, being at the time structed that the cause has not been finally submitted to them, and directe return at 1:00 p. m. and retire to the jury room for deliberation, and being c fully admonished as to their conduct as provided in said section, and upon t return at the hour named in the indictment, the court's written charge and bl verdicts are for the first time delivered to them, and they then retire to delibe upon their verdict, the cause will be held to have been submitted at the hou reassembling and not at the time of such separation, and in the absence showing that such separation has worked prejudice to the defendant the fac separation will not be ground for a new trial. State v. Ferrell, 69 O. S. 521.

The fact that one juror, after the jury had retired, separated from the rest went to a coffee house to procure some intoxicating liquor, though improper, is no itself sufficient ground for setting aside the verdict. State v. Dougherty, 1 Dec. 37, 1 Bull. 271.

Where the jury, after having retired to consider their verdict, are taken by sheriff to a restaurant for supper, without order of the court or knowledge of parties, it is not of itself misconduct. Johnson v. State, 1 O. S. U. 704, 38 Bull.

Agreement on verdict.—Where the indictment contains three separate cou and the jury say they find the defendant not guilty on the first, but can not a to the other counts, it is not error for the court to refuse to receive the verdict have it recorded. Hurley v. State, 6 O. 400.

A verdict, objectionable in form, need not be received by the court, and jury may properly be requested to further consider the case, and instructed a the form of the verdict, if they desire to find the defendant guilty of a partic crime charged in the indictment, and such form may be furnished to them be used if approved by them. Hurley v. State, 4 C. C. 425, 2 O. C. D. 630.

Where the defendant is on bail, it is not error to receive a verdict in his untary absence. Wilson v. State, 2 O. S. 319.

Verdict returned orally, by the jury, through their foreman, but not signed the foreman, is not such an irregularity as affects materially any substantial ri of the defendant. Hardy v. State, 19 O. S. 579.

While the verdict of the jury must represent the opinion of each individual j the opinions of the jurors may be changed by their conference in the jury r The very object of the jury system is to secure unanimity by a comparison of vi and by arguments among the jurors themselves. State v. Huffman, 86 O. S. 229.

It is not an abuse of discretion for a trial judge to keep a jury out for f hours in an important case and then send them back to their room with an admoni as to the importance to all concerned that they should agree upon a verdict. And v. State, 15 C. C. (N.S.) 241, 23 O. C. D. 564 (leave to file petition in error refu Andrews v. State, 57 Bull. 520).

Communication with jury.—A court or judge has no right to communi with the jury respecting the charge of the court, after the jury has retired, ex publicly, and in the presence of the accused. To do so is good cause for a trial. Kirk v. State, 14 O. 511.

The holding of conversations by the jury, while in their room, with persons the street, in regard to any subject of their deliberations before their verdic rendered, is, in general, good cause for setting aside their verdict. Farrer v. St 2 O. S. 54.

When a jury, of their own motion, and by their own means, without knowledge of the court, and without the presence, knowledge, or consent of prisoner, obtain a part of a newspaper, purporting to contain a part of the ch of the court in the case they are considering, and use said information to g their deliberations, although the charge thus published may happen to be accur the verdict ought to be set aside. Farrer v. State, 2 O. S. 54.

When the judge presiding at the trial of a prisoner for murder sends to jury, at their request, in the absence of the prisoner, a copy of the statutes of

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, calling their attention to the sections relating to homicide: Held, that it was xercise of discretion on the part of the judge, which did not prejudice the ner, and furnishes no ground for the reversal of the judgment. Gandolfo v , 11 O. S. 114.

On the trial of a felony, it is error to proceed, at any stage of the trial, during nforced absence of the accused, save only in the matter of the secret delib- ons of the jury, and perhaps in the hearing of motions after verdict and e judgment. Where the jury, on the trial of a felony, have retired to consider eir verdict, it is error for the court, on the return of the jury into court, to instruct them as to the law of the case in the absence of the accused, who is in jail under the order of the court. Such irregularity is not cured by the nce of defendant's counsel at the giving of such additional instructions. Nor a reviewing court inquire into the correctness of such additional instructions. v. State, 26 O. S. 208.

The jurors in a criminal case, after retiring to consider of their verdict, re- d into court and requested the judge to state his recollection of the evidence witness who had given material testimony on the trial. *Held*, that to comply the request is not error. Of course, it is necessary that the prisoner should esent, unless he absconds during trial. Hulse v. State, 35 O. S. 421.

When a juror in a criminal case makes no statement with respect to the er on trial until the jury retires to deliberate on their verdict, and then makes s fellow-jurors a statement of matter alleged to be within his own knowledge, adicting in an important particular the testimony of one of the defendant's wit- s, and the defendant is convicted, ground is afforded by such misconduct for a rial, where the fact is properly made to appear; but the affidavits of jurors will e regarded for the purpose of setting aside the verdict, until misconduct of the is shown *aliunde*. Kent v. State, 42 O. S. 426.

Where the court has instructed the sheriff to furnish food to the jury upon retirement it is not misconduct for him to discuss with the jury what they to eat, nothing being furnished them but coffee and doughnuts. Reighard v. , 22 C. C. 341, 12 O. C. D. 382.

Where a juror, while the jury were viewing the premises, asks a question of ner in regard to the premises, it is not in itself such misconduct as will warrant ersal of the verdict. Reighard v. State, 22 C. C. 341, 12 O. C. D. 382.

Waiver in criminal cases.—That, in the prosecution of criminal offenses, defendant can not be prejudiced by his waiver of any statutory requirements, Williams v. State, 12 O. S. 622; Doyle v. State, 17 O. 222; Goodin v. State, S. 345; Cantwell v. State, 18 O. S. 477.

13689. For what cause court may discharge a jury.

The court may discharge a jury, without prejudice to the prosecu- for the sickness or corruption of a juror, or other accident or nity, or because there is no probability of such jurors agreeing. reasons of such discharge shall be entered on the journal. (R. S. 13; 78 v. 89; 66 v. 312, § 165.)

n a criminal cause, the discharge of the jury without the consent of the dant, after it has been duly impaneled and sworn, but before verdict, is alent to a verdict of acquittal, unless the discharge was ordered in conse- e of such necessity as the law regards as imperative. In such case, the l must show the existence of the necessity which required the discharge of ury; otherwise, the defendant will be exonerated from the liability of further ering to the indictment. Hines v. State, 24 O. S. 134.

While a jury in a criminal case may, in certain circumstances, be discharged, the accused lawfully subjected to another trial, this can only be done where

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he has consented to the discharge, or been guilty of such fraud in respect t conduct of the trial as that he was in no real peril, or where there is n necessity for the discharge, such as the death or serious illness of the pre judge or a juror, the ending of term before verdict, or the inability of the to agree, after spending such length of time in deliberation as, in the opinion judge sustained by the facts disclosed in the record, renders it unreasonabl improbable that there can be an agreement. Mitchell v. State, 42 O. S. Hurley v. State, 6 O. 399.

After the submission of a criminal case to a jury, their retirement to room for deliberation, and their failure to agree upon a verdict, they wer charged by the court. The following entry was thereupon made by the upon the trial docket: "Jury impaneled and sworn. Trial had. Jury disch for the reason that there was no probability of jurors agreeing. Recogn fixed at $1,000. Continued." At the second term of the court thereafte defendant was again put upon his trial to a jury, upon the same indict He moved the court to discharge him from further prosecution, offering in ev in support of his motion the journal entry of the proceedings at the former from which had been omitted the recital from the court docket of the reas the discharge of the jury. Thereupon the state moved the court to supply omission by an order *nunc pro tunc*, which was done, the motion to discharg defendant overruled, and the trial allowed to proceed. *Held*, there was no in such action of the court. Benedict v. State, 44 O. S. 679.

Where a defendant on his trial on an indictment charging him with the of larceny has been found guilty by the jury and sentenced by the court, an prosecuted a proceeding in error to reverse such judgment, and the record that on a former trial of the defendant on the same indictment, at a pr term of the court, a jury was duly impaneled and sworn, and the evidenc arguments of counsel heard and the charge of the court given, and tha jury had retired to consider of their verdict, and on the same day an entry placed upon the journal of the court reciting that "afterwards came the said into open court and stated that they are unable to agree upon a verdict, upon they are by the court discharged from further consideration of this and the said case is passed." *Held*, that no sufficient or any reason being show the discharge of such jury, and it not appearing that it was with the consent defendant, or that the question of the necessity for the discharge of the had engaged the attention of the court, or that such order was the result o sideration, that on the record as it stood, the discharge of the jury operated discharge of the defendant from further prosecution on such indictment.

In fact such discharge of the jury was on sufficient ground, and was the of consideration by the court, but by accident or inadvertence the order o court discharging the jury was not properly entered upon the journal, a p entry may be made *nunc pro tunc*, at a subsequent term of the court, on of the facts, or on the personal knowledge of the court. Ladd v. State, 5 276; 3 O. C. D. 137.

In a criminal cause, the discharge of the jury without the consent o defendant, after it has been duly impaneled and sworn, but before verdi equivalent to a verdict of acquittal, until the discharge was ordered in conseq of such necessity as the law regards as imperative.

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In such case, the record must show the existence of the necessity which quired the discharge of the jury; otherwise, the defendant will be exonerated m the liability of further answering to the indictment. Hines v. State, 24 O. S. 4. See, also, Poage v. State, 3 O. S. 229; Dobbins v. State, 14 O. S. 493; ewart v. State, 15 O. S. 155; Hurley v. State, 6 O. 399.

Where the discharge of a jury first impaneled is the necessary result of susning the objection interposed by the defendant himself, it does not operate as an quittal, and is not a bar to a further prosecution. Stewart v. State, 15 O. S. 5.

In a criminal case, the trial of which was begun at 9:00 o'clock in the rning and the case finally submitted to the jury at 4:20 o'clock, P. M., of the ne day, the jury after deliberating thereon until 7:00 the same evening returned o open court and informed the court that they were unable to agree upon verdict, whereupon the court, without the consent of the defendant, discharged d jury from the further consideration of said case, and entered upon the rnal of the court the reason therefor, "that it satisfactorily appears to the court t there is no probability of the jury agreeing upon a verdict in this case, d for this reason said jury is discharged from the further consideration of this se;" and there being nothing in the record to impeach such finding and entry, to show that the court acted arbitrarily or in abuse of sound legal discretion, cept only the length of time the jury were kept together for deliberation.

Held: That under § 7313, Revised Statutes (G. C. 13689), such entry shows e existence of legal ground for the discharge of said jury, and for that reason ere was no error in the action of the court, and such discharge did not operate a discharge of defendant from further prosecution, and it can not therefore ail defendant for that purpose by way of plea in bar. State v. McMillen, 69 S. 247.

Entry—Discharge of jury.

(Title.) Indictment for ———.

It appearing to the court that (state the cause of the discharge); the court, erefore, discharges the said jury without day and without prejudice to the osecution of this case.

c. 13690. Jury may be polled.

When the jurors agree upon their verdict they must be conducted to court by the officer having them in charge. Before such verdict is cepted, the jury may be polled, at the request of either the prosecutg attorney or the defendant. (R. S. § 7314; 66 v. 312, § 166.)

Return of verdict.—The verdict should be received in the presence of the isoner, that he may have the jury polled. Sargent v. State, 11 O. 472.

On the trial of an indictment for a criminal offense, and at the return of the rdict, it is the right of the accused to be present; and if prevented by imprisonent or other improper means, he is entitled to a new trial. Rose v. State, 20 31.

Where the defendant is on bail it is not error to receive a verdict in his luntary absence. Wilson v. State, 2 O. S. 319.

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Where, in a criminal case, a verdict of guilty, as charged in the indictm is returned by the jury, through their foreman, orally, in open court, in proper f and each juror, in response to the interrogatory of the clerk, says the verdic his, and it is entered upon the record, the fact that the verdict is not in writ signed by the foreman, is not such an irregularity as affects materially any stantial rights of the defendant, and is not ground for a new trial. Hardy v. St 19 O. S. 579.

The counsel of the accused are entitled to a reasonable opportunity to present at the receiving of the verdict. But where the court, after the jury agr had the courthouse bell rung, in pursuance of an announcement made at time the jury retired, and also counsel called, and a reasonable time elasped counsel to appear, all was done by the court that the defendant or his counsel a right to expect. Weaver v. State, 24 O. S. 584; Crusen v. State, 10 O. S. Sutcliffe v. State, 18 O. S. 469.

On the trial of an indictment for a criminal offense, and at the return of verdict, it is the right of the accused to be present, and if prevented by impri ment or other improper means he is entitled to a new trial. Rose v. State, 20 O.

Where the stenographer's transcript shows that when the jury was po eleven men answered, in the absence of anything showing that there were but el present, the verdict was properly received. Ryan v. State, 10 C. C. (N.S.) 497 O. C. D. 306.

Where the indictment contains three separate counts, and the jury say t find the defendant not guilty on the first, but can not agree to the other counts, not error for the court to refuse to receive the verdict and have it recorded. Hurle State, 6 O. 400.

A verdict objectionable in form, need not be received by the court, and jury may properly be requested to further consider the case, and instruction to form of the verdict. Hurley v. State, 4 C. C. 425, 2 O. C. D. 630.

While the court may, it is not bound to receive a verdict which finds defendant guilty on one count, without any finding as to the other counts; and, general rule, where such verdict is tendered, the court should require the jury deliberate further, so as to be able to respond to each count. Jackson v. State O. S. 37.

Amendment of verdict.—After the jury have returned their verdict, been discharged, and have separated, they can not be recalled to alter or amend Sargent v. State, 11 O. 472.

After a jury have rendered a verdict and separated they can not be recalle alter or amend it. Helmerking v. State, 1 Dec. Rep. 444, 10 W. L. J. 66.

Bail after verdict.—In a criminal case, "except for capital offenses w the proof is evident or the presumption great," after a verdict of guilty and be sentence, the court may, in its discretion, take a recognizance for the appearanc the prisoner to abide the judgment of the court. After failure so to appear, and forfeiture of the recognizance, the sureties are liable on the recognizance. Hamp v. State, 42 O. S. 401.

Sec. 13691. Jury to ascertain the value of the property stolen.

When an indictment charges an offense against property larceny, embezzlement or obtaining it by false pretense, the jury

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viction, shall ascertain and declare in their verdict the value of
ı property. (R. S. § 7315; 66 v. 312, § 167.)

This section of the code relates solely to offenses against the property of
her by larceny, embezzlement, and false pretenses. It applies to the offense of
e-stealing (Armstrong v. State, 21 O. S. 357), but not to the crime of obtaining
alse pretenses the signature of a person, as maker, to a promissory note. Ellars
tate, 25 O. S. 385.

Where, on an indictment containing counts for horse-stealing and grand larceny
ed, the jury find a general verdict of guilty, assessing the value of the property
ross, without finding the amount charged in each count, and the court enters
gment on such finding, it will be erroneous. Barton v. State, 18 O. 221.

A verdict rendered upon the trial of a valid indictment for pocket-picking,
h finds the defendant guilty of pocket-picking in manner and form as charged
he indictment, is sufficient to sustain judgment and sentence, although such
ict does not find and return the value of the property taken. Harris v. State,
. S. 82.

Formerly it was held that under an indictment for larceny, laying the value
he property at $480.00, a general verdict of guilty implies a finding that the
e of the property stolen at least equals $35.00 and an express finding in the
ict of such value was unnecessary. Schoonover v. State, 17 O. S. 294.

This section applies to the offense of horse stealing and where the jury return a
ral verdict of guilty, without stating the value of the property stolen, the
gment will be reversed. Armstrong v. State, 21 O. S. 357.

Forgery is not one of the crimes mentioned in this section, and the value of the
ed instrument need not be averred. Chidester v. State, 25 O. S. 433.

In proving the value of personal clothing, on a trial for the larceny thereof,
testimony should not be confined to current prices among dealers in second-hand
hing. Pratt v. State, 35 O. S. 514.

Under an indictment for pocket-picking it is not necessary for the jury in their
ict to find the value of the property taken. State v. Whitten, 82 O. S. 174.

Where a single offense is charged by an indictment containing four counts,
ı charging the embezzlement of $3,000, a general finding of the jury that the
endant was guilty and fixing the amount at $5,000 can not be upheld. Myers
tate, 4 C. C. 570, 2 O. C. D. 712.

Where on the trial of such an indictment it is shown that the money charged
ave been embezzled by the defendant was converted to his use at many different
es, and that the greatest sum so converted at any time was $1,824.24, a verdict
ing the defendant guilty of embezzling $5,000 is contrary to the evidence,
a new trial should be awarded. Myers v. State, 4 C. C. 570, 2 O. C. D. 712.

. 13692. Of what degree defendant may be found guilty.

Upon an indictment, the jury may find the defendant not guilty of
offense charged but guilty of an attempt to commit it, if such at-
ıpt is an offense at law. When the indictment charges an offense
luding different degrees, the jury may find the defendant not
lty of the degree charged and guilty of an inferior degree thereof.
the offense charged is murder, and the accused is convicted by con-

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fession in open court, the court shall examine the witnesses, de mine the degree of the crime, and pronounce sentence accordin (R. S. § 7316; 66 v. 312, § 168; 33 v. 33, § 39; S. & C. 416.)

Attempt to commit an offense.—A verdict, on an indictment for finding the defendant not guilty of the crime charged, but guilty of an att to commit the same, is not sufficient to convict the defendant of an assault intent to commit rape. Fox v. State, 34 O. S. 377.

An indictment, which charges, in proper form, an attempt to comm robbery, and then avers that the defendant, with others, in such attempt, unlawfully and purposely, by means of a revolver loaded with gunpowder a leaden bullet, shoot the deceased, with intent to unlawfully and purposely and murder him, and did, by means of the shooting, strike, penetrate, and w him, with intent unlawfully and purposely to kill and murder him, thereby g him a mortal wound from which he instantly died, and that by these m they did unlawfully, purposely, and in an attempt to perpetrate a robbery, kill murder the deceased, sufficiently charges murder in the second degree, alth the word malice is not employed in the indictment in describing the act. Lin v. State, 69 O. S. 215.

It is not error in such case for the court, in connection with proper ins tions with respect to the several degrees of murder, and as to assault and ba to charge, if the facts proven warrant it, as follows: "Has the state establ by clear, convicting and satisfactory evidence beyond a reasonable doubt, tha defendant is guilty as charged in the indictment or of some other degree of m or manslaughter, or it may be assault and battery, or assault merely; othe your verdict should be not guilty." Lindsey v. State, 69 O. S. 215.

The rule as to strict construction of penal statutes does not require the c to go to the extent of defeating the purpose of the statute by a severely tech application of the rule. Conrad v. State, 75 O. S. 52.

Where one starts to carry out the purpose to commit a rape, arson, rob or burglary, and kills another under circumstances so closely connected the crime which he has undertaken as to be a part of the res gestae thereof, guilty of murder in the first degree, within the meaning of § 6808 of the Re Statutes (G. C. § 12400), whether the crime which he originally undertook been technically completed or not. Conrad v. State, 75 O. S. 52.

When two, in furtherance of a common design, enter upon the perpetratio a burglary, armed and prepared to kill if opposed, and while so engaged are covered, and in the effort to escape one of the burglars kills one who is tryin arrest him, both burglars are equally guilty of the homicide, although one of was not armed with a deadly weapon, and although such killing was not part o prearranged plan. Conrad v. State, 75 O. S. 52.

When under such circumstances one of the burglars, at a short distance the building and on another lot, shot and killed a police officer, who had comma him to halt, the court properly found that the killing was in the perpetratio the burglary, and that it was murder in the first degree. Conrad v. Stat O. S. 52.

Where an indictment charges the offense of rape with consent under § 1 General Code, the defendant may under such an indictment be convicted o attempt to commit the offense under § 12415, General Code. In such case it is for the court to refuse to charge that if the evidence fails to show that the defen

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guilty of the completed offense under § 12414 the defendant may be convicted of n attempt to commit the offense. State v. Baltimore, 90 O. S. 196.

This section was intended to define the power of the jury and not to control the orm of verdict. Morehead v. State, 34 O. S. 212.

A person indicted for burglary may properly be found guilty of an attempt to ommit burglary, since attempts are specifically punished by G. C. § 12438. Donaldson State, 10 C. C. 613, 5 O. C. D. 98.

Where a defendant stealthily removes a watch from another's pocket, which atch is attached to the end of a chain, the chain being fastened to the owner's at, and the defendant is arrested before he has gotten possession of the watch, he not guilty of pocket picking. He can not be convicted for attempting to pick ockets because there is no such statutory crime in Ohio. State v. Jackson, 18 N. P. N.S.) 206 (motion for leave to file a bill of exceptions overruled by the supreme urt, November 19, 1915, "for the reason that the exceptions to the judgment are ot well taken," 13 O. L. R. 467).

This section applies only to conviction for such attempts as are punished by atute; and under an indictment for abortion one can not be found guilty of an tempt. State v. Springer, 4 O. D. 169, 3 N. P. 120.

Inferior degree.—Indictment for assault with intent to kill; party may be nvicted of assault and battery, or asault alone. Stewart v. State, 5 O. 241.

Upon trial under an indictment for murder in the first degree, it is error r the court to charge the jury that if they find the prisoner guilty of the omicide, they must state in their verdict that they find him guilty of murder the first degree. A verdict against the prisoner should be set aside for such isdirection, though his counsel have claimed, in the argument of the case before e jury, that the prisoner, if guilty at all, was guilty of murder in the first egree; and though no exception was taken when the erroneous instruction was ven to the jury. Beaudieu v. State, 8 O. S. 634.

On an indictment for murder in the second degree, the jury may return a erdict for manslaughter. Wroe v. State, 20 O. S. 460.

A person indicted for maliciously shooting another person with intent to kill ay be convicted under such indictment of the offense of assault and battery. eller v. State, 23 O. S. 582.

Under an indictment containing a count for robbery, and a count for an ssault with intent to commit robbery, the defendant may be acquitted of the igher degrees of the offenses charged, and convicted of assault and battery, or f assault alone; and a refusal of the court so to instruct the jury is error, for hich the judgment may be reversed. Howard v. State, 25 O. S. 399; Hanson v. State, 3 O. S. 376.

On the trial of an indictment for murder it is competent for the jury, where he evidence justifies it, to find the defendant guilty of an assault and battery only, nd it is error to the prejudice of the defendant to instruct the jury otherwise. Iarts v. State, 26 O. S. 162.

It is within the lawful province of the jury, in all trials for murder, to determine the grade of the crime. But, notwithstanding this right of the jury, it is he right and duty of the court to instruct them upon all questions of law arising efore them in the case; and it is the duty of the jury to receive the law as given o them by the court. The court, however, can not imperatively require the jury o render a verdict for a particular degree of homicide, nor deny to them the ower of rendering such verdict as their judgment and conscience dictate, after

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being instructed as to their duty. Where an indictment for murder in the fi degree contains several counts, under either of which it is equally compet on the same proof to return a verdict of murder in the second degree, it not to the prejudice of the accused for the court to restrict the jury, in find the defendant guilty of murder in the second degree, to one of the counts or Adams v. State, 29 O. S. 412.

Upon the trial of an indictment for murder in the first degree, a verdict guilty of murder in the second degree, without expressly acquitting the defend of murder in the first degree, is good. Such verdict is equivalent to "not guil of the higher degree of crime charged. Morehead v. State, 34 O. S. 212.

On the trial of an indictment for murder in the first degree, charging accused with purposely killing another by administering poison, the evide tending to show no other grade of offense, it is error to charge the jury to effect that if they find the accused guilty their duty will be fulfilled by convict of murder in the first or second degree, or manslaughter. And where the verd is returned for a lower grade of homicide than murder in the first degree, a n trial should be granted, where it appears from the evidence that a verdict acquittal might have been rendered had the jury been properly instructed. Dresb v. State, 38 O. S. 365.

In this state, neither the common law in relation to crimes, nor the comm law distinction between felonies and misdemeanors, nor the doctrine of merger criminal cases, has at any time existed; the accused may be found guilty of principal offense charged in the indictment, or acquitted thereof and found gui of any offense in terms or by necessary implication charged in the indictme Mitchell v. State, 42 O. S. 383.

Maim and mayhem are, at common law, equivalent words, and mean the sa thing; therefore, a count in an indictment charging the defendant with maliciou biting the ear of another with intent to maim, can not be supported as to particular intent charged, as the biting of an ear does not in law constitute maiming. State v. Johnson, 58 O. S. 417.

Nor can a conviction be had on such count, for biting the ear with int to disfigure under § 7316, Revised Statutes, permitting a conviction of an infer degree of offense charged, as a biting with intent to disfigure is not inferior t biting, with intent to maim, under § 6819, Revised Statutes. Both offenses of the same degree. Barber v. State, 39 O. S. 660; State v. Johnson, 58 O. S. 4

Under an indictment charging an injury to the person of another with int to maim or disfigure, the party may be convicted of an assault and battery, un the provisions of § 7316, Revised Statutes; the offense charged being simply aggravated assault and battery. State v. Johnson, 58 O. S. 417.

Under an indictment for asault with intent to wound, a conviction may had for assault only. White v. State, 13 O. S. 569.

On the trial of an indictment for murder in the first degree, where the co instructs the jury that if they shall find the defendant guilty as charged, they m if they think proper, recommend mercy; and further instruct them that the le effect of such recommendation by them will be to change the punishment of accused from death to imprisonment in the penitentiary for life, such instructi is a correct and sufficient charge or instruction on that subject. State v. Schill 70 O. S. 1.

On the trial of such indictment, the court is not required to instruct jury that no person so convicted and imprisoned "shall be recommended for pard

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the board of pardons, or for parole by the board of managers of the penitentiary, cept upon proof of innocence established beyond a reasonable doubt;" and the nission to so instruct the jury is not error. State v. Schiller, 70 O. S. 1.

An indictment charging, in separate counts, shooting with intent to kill and ooting with intent to wound includes the lesser offenses of assault and battery nd assault, and upon the trial of the accused upon such an indictment the jury ay find the accused not guilty of shooting with intent to kill and not guilty of ooting with intent to wound, but guilty of assault and battery or an assault only. ate v. McCoy, 88 O. S. 447.

The tender of a plea of guilty of assault and battery by the accused upon raignment under an indictment charging shooting with intent to wound and ooting with intent to kill, which tender is rejected by the state, is not a proper bject of record on the journal of the court. Canter v. State, 90 O. S. 1.

An entry on the journal reciting the tender of a plea of guilty of assault and ttery upon arraignment under an indictment charging shooting with intent to ound and shooting with intent to kill and its rejection by the state is inadmissible evidence upon the trial of the accused under the indictment. Canter v. State, O. S. 1.

Where the evidence warrants, a conviction of assault in a trial on an indictment arging that the defendant, being a male person of the age of eighteen years, rnally knew and abused a female person under sixteen years of age with her nsent, will be sustained. Snyder v. State, 92 O. S. 167.

Under an indictment for assault with intent to rob, a conviction may be had r assault and battery. Hanson v. State, 43 O. S. 376.

In a trial of one indicted for murder in the second degree, it is error to charge at the jury should either find the accused guilty of murder in the second degree manslaughter or acquit him, for this excludes the two lesser offenses of assault nd battery and assault alone. Duranec v. State, 16 C. C. (N.S.) 20.

Where an assault is committed by a blow upon the head with a blunt instrument, nder circumstances evincing an intent to permanently disable the person assaulted respect to the use of some member of the body necessary in defense of his person to annoy his adversary, the party committing the assault may be convicted of assault with intent to maim. O'Brien v. State, 11 C. C. (N.S.) 495.

A person is not prejudiced by being tried and convicted for larceny when he ight have been tried and convicted of robbery, an aggravated larceny, for the same fense. Brennan v. State, 11 O. C. D. 316.

Under § 39 of the crimes act of 1831, it was held that the verdict must specifically nd the degree of murder whereof the defendant is convicted. Parks v. State, O. S. 101; Dick v. State, 3 O. S. 89; Adams v. State, 29 O. S. 412.

A verdict may be found for assault only, under an indictment charging an ssault with intent to wound. White v. State, 13 O. S. 569.

The constitutionality of statutes permitting a jury to convict of an offense ot charged in the indictment, but which is of a lower or inferior degree is well tablished. Brown v. State, 2 C. C. (N.S.) 409, 15 O. C. D. 130 (affirmed, 77 O. S. 6).

It is not necessary that crimes should be divided into degrees in order that ey may come within a statute, such as § 7316, authorizing a jury to find the efendant guilty of an attempt to commit the offense charged in the indictment; nd inasmuch as the offense of pocket-picking is the same as that of robbery, except at it lacks the ingredient of force or violence or putting in fear, and one indicted

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for robbery can be convicted of pocket-picking. Brown v. State, 2 C. C. (N 409, 15 O. C. D. 130 (affirmed, 77 O. S. 636).

A defendant indicted for robbery and convicted of pocket-picking can not c plain that he was not notified of the charge against him in the indictment. Br v. State, 2 C. C. (N.S.) 409, 15 O. C. D. 130 (affirmed, 77 O. S. 636).

In order to justify a conviction of murder in the second degree it must affirmatively proved that the accused "purposely" killed the deceased; to s that he purposely inflicted the wound that caused the death, or that he purpo struck the deceased, from which stroke the deceased died, is not sufficient. follows, therefore, that it is error to charge the jury to the effect that, if proof shows that defendant "purposely" committed the act, the natural and p able consequence of which was to and did cause the death of the deceased, evid on behalf of the defendant tending to show that he did not intend in fac kill the deceased, is immaterial.

In such a prosecution, where it is claimed that the defendant acted in s defense, and does not admit any intent to kill, a charge that "no other groun justification or excuse than self-defense is claimed by the defendant, and no o will be considered by you," tends to exclude the right of the defendant to re the grade of the offense charged from murder in the second degree to manslaug and is prejudicial error. Munday v. State, 5 C. C. (N.S.) 656, 16 O. C. D 712 firmed, 72 O. S. 614).

In the trial of one indicted for first degree murder it is not prejudicial erro the part of the court to fail to charge the jury that they might find defendant gu of assault and battery, where under the charge as given the jury might have fo the defendant guilty of a crime of lesser degree than that of which they di fact find him guilty. Murray v. State, 23 C. C. (N.S.) 508.

Under an indictment for murder in the first degree a jury can not find defendant guilty of riot. Watha v. State, 14 C. C. (N.S.) 145 (motion to file peti in error, overruled).

One acquitted of petit larceny before a police court can not afterwards prosecuted for grand larceny of the same property, since under an indictment grand larceny a conviction for petit larceny may be had. State v. Skinner, 13 O 468.

Where the defendant was twice put on trial for the same act, first, under indictment for "shooting," and later under an indictment for "shooting at," he held to be twice jeopardized since under both indictments a verdict for assault c have been rendered. Mitchell v. State, 42 O. S. 383.

Several counts.—Where, in an indictment for shooting with intent to and for assault with intent to murder, the jury finds the defendant guilty of first charge, the court can not, with the consent of the jury, enter a verdict of gu generally on all the counts of the indictment. Wilson v. State, 18 O. 143.

Where distinct offenses are charged in separate counts of an indictment, jury must either return a general verdict, or else respond to each charge in t finding. Wilson v. State, 20 O. 26.

Where several counts are for different offenses, which, however, are of same nature, and of which the punishment is the same, there is no misjoinder, a general verdict of guilty is good. Stoughton v. State, 2 O. S. 562.

One good count in an indictment will support a general verdict of guilty, other counts being bad. Stoughton v. State, 2 O. S. 562.

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Where an indictment contained seven counts, and the verdict was not guilty on the sixth and seven counts, and guilty on the other counts, the verdict is ivalent to a general verdict of guilty on the first five counts. Bailey v. State, . S. 440.

The rule that a judgment on a general verdict of guilty on an indictment taining several counts, some of which are good and some bad, will be sustained, not varied by the circumstances that a demurrer of the defendant to the bad nts was overruled, after which the defendant pleaded not guilty to the whole ictment, it not appearing from the record that the defendant was prejudiced the introduction of evidence under the said counts, which was not competent ler the good counts. Robbins v. State, 8 O. S. 131.

A judgment on a general verdict of guilty on an indictment containing some d and some bad counts is not erroneous because not rendered with express erence to the good counts. Boose v. State, 10 O. S. 575.

A general verdict that the defendant "is guilty in manner and form as he nds charged in the indictment," where the indictment contains two counts charg- distinct misdemeanors, will authorize a sentence upon each count. Eldredge v. te, 37 O. S. 191.

While the court may, it is not bound to receive a verdict which finds the endant guilty on one count, without any finding as to the other counts; and, as general rule, where such verdict is tendered, the court shall require the jury deliberate further, so as to be able to respond to each count. Jackson v. State, O. S. 37.

In an indictment for murder containing two counts, the first charging a person h aiding and abetting, the second charging such person with the murder jointly h the principal, it is not error to refuse to direct the jury to make a special ling upon which count the prisoner is guilty in such indictment; nor is a dict under such indictment, of guilty as charged, invalid. Hotelling v. State, 3 . 630, 20 O. C. D. 366.

A general verdict of guilty upon an indictment for foeticide containing two nts, in one of which it is charged that the crime was committed by means an instrument, and in the other by administering a drug, is not bad for repug- cy. Tabler v. State, 34 O. S. 127.

A verdict is not inconsistent which finds the defendant guilty under several nts in which the time is differently stated. Griffin v. State, 18 O. S. 438.

Under an indictment containing a count for robbery, and a count for assault h intent to commit robbery, a conviction may be had of assault and battery or of ault alone. Howard v. State, 25 O. S. 399.

An indictment charging, in separate counts, shooting with intent to kill and oting with intent to wound includes the lesser offenses of assault and battery, l upon the trial of the accused upon such an indictment the jury may find the used not guilty of shooting with intent to kill and not guilty of shooting with ent to wound, but guilty of assault and battery or an assault only. State v. Coy, 88 O. S. 447.

It is not inconsistent for a jury to find a defendant not guilty of forgery or uttering of a forged check, but guilty of false pretenses in obtaining money upon heck which had been raised. State v. Griffith, 18 N. P. (N.S.) 161 (affirmed by rt of appeals).

Under a charge, "If this check was signed by A and at the time it was signed A was made out to the amount of $3,597.30, and A made out the check for that

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amount or signed it with that amount in it at the time that he signed it, the d ant can not be guilty of obtaining money on false pretenses under the third of the indictment, for the reason that the bank would not have been defrau any money. The bank would have honored a check drawn by a depositor u proper signature and between the bank and the depositor the bank could liable and therefore could not have been defrauded of its money. But if the was a forged check at the time it was presented for payment at the bank an presenting a forged check to the bank knew it was forged and fraudulent and sented to the bank in the presenting of it that it was a good check and ha drawn for the full amount, and the bank had paid the check, then the bank wo liable to the depositor for having paid the check which the depositor did not and B would be liable for obtaining from the bank the difference betwe amount of the check as originally drawn and the check as altered by hi then he would be guilty of obtaining money to the value of this difference false pretenses if at the time you should find beyond a reasonable doubt t knew the check was forged or altered at the time he presented it," a jur find the accused guilty of obtaining money under false pretenses by presen forged check knowing it to be forged; and it may find him not guilty, under a count, of forging a check or of uttering a false check. State v. Griffith, 18 (N.S.) 161 (affirmed by court of appeals).

Where an indictment is for but one offense, though charged in several in different ways, and the defendant is convicted upon some of the count acquitted upon others, the granting of a new trial upon his motion opens for retrial upon the counts on which he was acquitted, as well as those on wh was convicted. Otherwise when the counts are for separate and distinct of Leslie v. State, 18 O. S. 390; Jarvis v. State, 19 O. S. 585; State v. Be 20 O. S. 572; Hurley v. State, 4 C. C. 425, 2 O. C. D. 630.

Under an indictment containing two counts, one, charging burglary and la and the other, with having knowingly received stolen goods, being the same named in the former count, a finding by the jury that the accused "is gu receiving stolen goods * * * and do not find as charged in the first and counts of the indictment," does not amount to a verdict of not guilty as c in the indictment, but shows an intent to find a verdict of guilty under the count; and justifies a refusal to discharge the second indictment chargi same offense to return a verdict for the defendant. Carano v. State, 3 C. C. 629, 14 O. C. D. 93 (affirmed, 69 O. S. 561).

The facts of burglary, of larceny, and of possession of the stolen good thereafter by the accused, do not, alone, raise a presumption of law th accused is guilty of both the burglary and the larceny, but they do raise sumption against him strong enough to call upon him to explain how he ca possession of the goods. Carano v. State, 3 C. C. (N.S.) 629, 14 O. C. D. 93 (af 69 O. S. 561).

One acquitted under an indictment for stealing certain property may be quently indicted and tried for receiving and concealing the same property, kn it to have been stolen. Beamer v. State, 10 C. C. (N.S.) 131, 19 O. C. D. 578.

Acquittal of the charge of burning a dwelling-house is not a bar to a quent prosecution for the same offense, under an indictment charging the b of a structure other than a dwelling-house. Van Immons v. State, 12 C. C. 417, 19 O. C. D. 681 (affirmed, 72 O. S. 678).

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eneral verdict.—A general verdict of guilty covers all the material aver-
s constituting the crime charged; it is a conviction of the whole offense charged.
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A general verdict of guilty covers all the averments constituting the crime
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A general verdict that the defendant "is guilty in manner and form as he
ds in the indictment," where the indictment contains two counts charging dis-
misdemeanors, will authorize a sentence upon each count. Eldredge v. State,
S. 191, but see Buck v. State, 1 O. S. 61.

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A judgment on a general verdict of guilty on an indictment containing some
and some bad counts is not erroneous because not rendered with express
ence to the good counts. Boose v. State, 10 O. S. 575.

On an indictment for maliciously cutting with intent to wound, a verdict of
lty of cutting with intent to wound," is not sufficient to sustain a judgment
pon conviction. Riflemaker v. State, 25 O. S. 395.

A verdict finding an accused guilty of "assault and battery," under an indictment
charged only "shooting at with intent to wound," is not equivalent to an
ittal; and the accused is not entitled, under such a verdict, to an arrest of
ment or a discharge. Griggs v. State, 10 C. C. (N.S.) 468, 20 O. C. D. 149
rmed, 52 W. L. B. 348).

Where on a trial for murder, the defendant is found guilty of a lower degree
omicide than the highest degree charged in the indictment, and, on his motion, a
trial is granted, the effect of granting the new trial is to set aside the whole
ict, and leave the case for retrial upon the same issues as on the first trial.
e v. Behimer, 20 O. S. 572; Hurley v. State, 4 C. C. 425, 2 O. C. D. 630.

Under an indictment for causing death in attempting to produce miscarriage,
rdict of "guilty of procuring an abortion" is not responsive. Florien v. State,
. C. 596. 8 O. C. D. 171.

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A verdict finding the defendant "guilty of unlawfully and knowingly u a certain instrument to procure a miscarriage as charged in the first count of "indictment" is not responsive to an indictment which charges the use of an ins ment for the said purpose and that the result of its use was a miscarriage, an judgment can be entered upon such verdict. Geer v. State, 16 C. C. (N.S.) 142.

If defendant is charged with murder in the second degree, and the trial c instructs the jury properly that the crime charged includes the lesser crime manslaughter, assault and battery, and assault, for either of which a verdic guilty might be returned by the jury together with a verdict of not guilty of crime of murder in the second degree as charged in the indictment, a verdic "guilty as he stands charged in the indictment" is sufficient. Andy v. Sta O. A. R. 103, 19 C. C. (N.S.) 93, 26 O. C. D. 146.

On an indictment for murder containing two counts, the first charging defendant with aiding and abetting, the second charging him with the murder jo with the principal, a verdict of guilty as charged is sufficient. Hotelling v. S 3 C. C. 630, 2 O. C. D. 366.

For a sufficient verdict under an indictment charging, in separate co burglary and larceny and receiving stolen goods, see Carano v. State, 2 C. C. (629, 14 O. C. D. 93 (affirmed, without report, 69 O. S. 561).

Severable verdict.—A verdict is severable only when there is a convicti an acquittal on different counts for separate and distinct offenses, or where ther several defendants, but where there is but one defendant and but one offense verdict is entire. State v. Behimer, 20 O. S. 572.

Under an indictment against two persons one may be acquitted and the convicted. State v. Stevens, 1 Dec. Rep. 82, 2 W. L. J. 66.

Confession of guilt in open court—Constitutionality of act.— provisions of § 7316, Revised Statutes, which provide that "if the offense ch is murder, and the accused be convicted by confession, in open court, the shall examine the witnesses and determine the degree of the crime, and pron the sentence accordingly," are constitutional and valid. Craig v. State, 49 415.

The fact that on the trial of a criminal case, in the court and room presided by the judge of the court of common pleas who had been assigned by the judg the court of common pleas in joint session to hold court in said room, said invites another judge of the same court to sit with him in the trial of such and they together hear and agree upon the decision which should be rendered it is entered in due form upon the journal of the proper court, does not make action erroneous as to defendant, and particularly so when no objection wha was made to this until the filing of the motion for a new trial. Haas v. Sta C. C. 418, 7 O. C. D. 509.

Under the provisions of §§ 7316 and 6835, Revised Statutes, a person ind for the crime of burglary may properly be found not guilty of burglary, but g of an attempt to commit burglary. Section 6835 makes an attempt to com burglary a substantive offense, and § 7316 expressly warants this, if such att is an offense. And such provision is not in conflict with any provision of the stitution. Donaldson v. State, 10 C. C. 613, 5 O. C. D. 98.

The constitutionality of statutes permitting a jury to convict of an offens charged in the indictment, but which is of a lower or inferior degree is well e lished. Brown v. State, 2 C. C. (N.S.) 409, 15 O. C. D. 130 (affirmed, without re 77 O. S. 636).

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Nolle of part of indictment.—Where, after the jury was sworn on said econd trial, a nolle prosequi was entered by the prosecuting attorney as to so much f said indictment as charged that the homicide was committed "with deliberate nd premeditated malice," this did not operate to discharge the defendant from urther prosecution for any other crime properly charged therein, as of murder in he second degree or manslaughter. Hurley v. State, 4 C. C. 425, 2 O. C. D. 630 affirmed, 23 W. L. B. 465).

Where upon the trial of an indictment for an assault with intent to murder, he prosecuting attorney, by leave of the court, and without the consent of the efendant, enters a nolle prosequi, so far as relates to the intent to murder, such ntry of the nolle is equivalent to an abandonment of that part of the indictment hich is no farther prosecuted, and operates, so far, as an acquittal of the defendnt; but he may still, by the verdict of the jury, be convicted of the minor offense f an assault, in respect to which a nolle prosequi has not been entered. Baker v. tate, 12 O. S. 214.

ec. 13693. When jury to acquit on indictment for carrying concealed weapons.

Upon the trial of an indictment for carrying a concealed weapon, he jury shall acquit the defendant if it appear that he was at the time ngaged in a lawful business, calling or employment, and that the circumstances, in which he was placed, justified a prudent man in carrying such weapon for the defense of his person, property or family. R. S. § 7317; 56 v. 56, § 2; S. & C. 452.)

Cited in Weil v. State, 3 C. C. 657, 2 O. C. D. 382.

A property owner, who has reason to fear the police will not be able to protect is property and employes from injury at the hands of persons acting in an unlawful, isorderly and menacing manner, may lawfully employ persons to assist in guarding is premises from such threatened violence, and persons so employed as guards ay provide themselves with suitable weapons for protection against attack, and in doing while on or about the premises they are employed to guard they are not ubject to arrest and prosecution for carrying concealed weapons. State v. Taylor, O. L. R. 194, 56 Bull. 291.

A watchman employed to guard private property does not fall within the exmption to G. C. § 12819, provided for by this section, when on his way home from ork he enters a saloon, orders drinks, becomes intoxicated, exhibits his revolver nd insults persons on the street. State v. Matson, 9 O. L. R. 198, 57 Bull. 481.

Where one is charged with carrying concealed weapons, the burden of proof is pon him to show that he is within the provisions of this section. State v. Matson, O. L. R. 198, 57 Bull. 481.

In order to bring a defendant within the exceptions which permits the carrying f a concealed weapon, it is incumbent upon him to prove that he was at the time ngaged in a lawful business, calling or employment, and that the circumstances in hich he was so placed would have justified a prudent man in carrying such a eapon for the protection of his person, property or family. State v. Matson, 9 O. L. . 198, 57 Bull. 481.

General entry on return of verdict.

(Title.) Indictment for ———.

And the said jury having heard the testimony adduced by the parties, the rguments of counsel, and the charge of the court, after deliberation thereon,

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returned the following verdict, to-wit: "We, the jury, on the issue joined, fin
etc.

(Signed,) B F, Foreman.

(If the jury be polled, add, after the verdict:)

Whereupon, at the request of the counsel for the defendant, the court order that the jury be polled. And upon each juror being called by name, and inquir of if the verdict just read was his verdict, each for himself separately answer "It is."

(If the verdict be "guilty," add:)

And thereupon said defendant is ordered into the custody of the sheriff await sentence.

(If the verdict be "not guilty," add:)

And there being no further charge against said defendant, he is hereby d charged.

(The court may add to the discharge:)

It is further considered that the costs of this prosecution be paid by t said prosecuting witness, G F, and execution is awarded.

FORMS OF VERDICTS.

I. General verdict.

We, the jury on the issue joined, find the defendant guilty (or, not guilt as he stands charged in the indictment.

II. Verdict of guilty on one count.

We, the jury on the issue joined, find the defendant guilty of ——, he stands charged in the —— count of the indictment, and not guilty the —— count.

(In case of larceny, embezzlement, or obtaining money under false pretens add:)—and we do assess the value of the said property at —— dollars.

III. Verdict of guilty of an inferior degree.

We, the jury on the issue joined, find the defendant not guilty of ——, he stands charged in the indictment, but find him guilty of ——.

IV. Verdict of guilty of an attempt.

We, the jury on the issue joined, find the defendant not guilty of ——, charged in the indictment, but find him guilty of an assault, with intent commit ——.

SENTENCE.

Sec. 13694. What the court shall ask the convict.

Before sentence is pronounced, the defendant must be informed, b the court, of the verdict of the jury and asked whether he has anythin to say why judgment should not be pronounced against him. (R. S § 7318; 66 v. 313, § 169.)

Whether the provisions of the foregoing section are applicable where there a plea of guilty, *quaere.* Carper v. State, 27 O. S. 572.

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Where the record does not show that the court, before passing sentence on the efendant, informed him of the fact that a verdict of guilty had been found against m, in the absence of a bill of exceptions showing to the contrary, the fact that ich information was so given will be presumed. Bond v. State, 23 O. S. 349; artlett v. State, 28 O. S. 669.

Where the record does not show that after a plea of guilty and before sentence, e court asked the defendant if he had anything to say why judgment should ot be pronounced against him, in the absence of a bill of exceptions showing the ntrary, it will be presumed that such question was asked. Carper v. State, O. S. 572.

A sentence should be so complete as not to need the construction of a court determine its support. *In re* Moore, 14 C. C. 243; 7 O. C. D. 575.

A sentence can not be supplemented by a ministerial officer. *Id.*

Sentence may be suspended in whole or in part by every court having final risdiction, whether consented to or not by the defendant. Weber v. State, 58 O. S 9.

If made upon conditions, suspension will stand as long as conditions are comied with. *Id.*

If made without express conditions, court may set suspension aside at any time on its motion during the same term and order sentence to be executed. Weber State. 58 O. S. 616.

The pronouncing of judgment in a criminal case may be delayed for a reasonable me to hear and determine a motion for a new trial, or to give the defendant me to perfect an appeal or writ of error, or for other proper causes; but in the sence of a permissive statute a trial court can not suspend indefinitely the onouncing of sentence or the execution of judgment. Weber v. State, 58 O. S. 6, not followed; State v. Radcliffe, 18 N. P. (N.S.) 273.

The court has no inherent power to suspend sentence in a criminal case. That octrine belongs to the common law which was never in force in Ohio on the subct of crimes and procedure. The power now given by statute to suspend sentences certain cases is to be construed as a limitation of power as well as the conrring of power. State v. Radcliffe, 18 N. P. (N.S.) 273.

In passing upon a motion for a new trial on the ground of newly discovered vidence, the court can not reduce the sentence on the ground that the accused has vercome his bad habits and has been punished sufficiently. Such facts may be onsidered by the pardoning power, but not by the judicial power. McLaughlin v. tate, 20 C. C. (N.S.) 492.

Waiver of the right to a trial by jury does not clearly and affirmatively appear here the record merely states that "the defendant did not demand a trial by jury." etri v. State, 25 C. C. (N.S.) 255.

ec. 13695. When court to pronounce judgment.

If the defendant has nothing to say, or if he shows no sufficient ause why judgment should not be pronounced, the court shall proounce the judgment provided by law. In convictions of a capital ffense at least one hundred days shall intervene between the day f sentence and the day appointed for the execution thereof. (R. S. 7319; 68 v. 5, § 170.)

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Court shall pronounce judgment.—Where the accused is properly victed, it is the duty of the presiding judge to "pronounce the judgment pro by law." If the statute provides fine and imprisonment, he is as clearly wit discretion to omit either as he is to fine for a less or larger sum, or imprison shorter or longer term, than that provided in the act, Dillon v. State, 38 O. S.

When the accused is properly convicted, it is the duty of the cour "pronounce the judgment provided by law," and a judgment imposing a great less fine or imprisonment than the statute prescribes may be reversed; but w a statute provides for both fine and imprisonment, and one of the penalties is c ted, the error will not afford ground of reversal, if the punishment impos authorized by the act. Dillon v. State, 38 O. S. 586.

In a criminal case the court has the power to suspend the execution of sentence, in whole or in part, unless otherwise provided by statute; and power to set aside such suspension at any time during the term of court at v sentence was passed. Whether such suspension can be set aside at a subsec term is not decided. Weber v. State, 58 O. S. 616.

A defendant convicted in Lucas county of violating the provisions of Valentine Anti-Trust Law, §§ 4427-1 to 4427-12, Revised Statutes (G. C. § 63 § 6402), must, if imprisonment is part of the penalty imposed by the court, be tenced to the county jail and not to the Toledo workhouse. Lemmon v. S Beard v. State; Miller v. State, 77 O. S. 427.

The ruling in Lemmon v. State, 77 O. S. 427, does not apply to cou which do not contain a workhouse. State v. Wirick, 81 O. S. 343.

It is the duty of the court in pronouncing judgment against the accused criminal case to pronounce the judgment provided by law, and where a fine is of the penalty so provided, and the court is authorized by law to commit accused to the workhouse "until such fine and the costs of prosecution are or until he be discharged therefrom by allowing a credit of sixty cents per da such fine and costs for each day of confinement in such workhouse, or be o wise legally discharged," a sentence providing and requiring that the ac "shall stand committed to such workhouse until the fine and costs are p without adding thereto the further words of the statute, "or until he be disch therefrom by allowing a credit of sixty cents per day on such fine and c etc., while not wholly void is incomplete and erroneous, and where such sen has not been executed, it will be reversed. Hamilton v. State; Clarke v. S 78 O. S. 76.

Where a prisoner convicted of horse stealing is sentenced for one year statute imposing a minimum punishment of three years, such sentence, alth erroneous, is not void and is not ground for discharge on habeas corpus. S Ex parte, 7 O. S. 81.

Habeas corpus is not the proper remedy for irregularities in the sent but a writ of error will lie. Van Hagan, Ex parte, 25 O. S. 426.

Where the verdict is guilty of buying and selling stolen goods, the defen can not be sentenced for concealing stolen goods. Holtz v. State, 30 O. S. 486.

Where a person who is convicted of a crime under a statute prescribing pu ment by imprisonment in the penitentiary for a definite number of years is give indeterminate sentence the question of the validity of the statute authorizing

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erminate sentence can not be raised in a proceeding in habeas corpus. In re
, 91 O. S. 315.

The provision of G. C. § 12672, as amended in 101 v. 132, that where a person
been convicted of a second offense he shall be imprisoned in the penitentiary is
ex post facto or retroactive when applied to the case where the second offense
committed after the enactment of the provision for the punishment of the
d offense, although the first offense was committed prior to the enactment
ch provision. In re Allen, 91 O. S. 315.

Where the defendant in a criminal case is present under bail at the time the
nce is pronounced, and without being in custody of an officer, repaired to the
of the sheriff and was there taken in charge by the sheriff and imprisoned
cordance with the sentence, the imprisonment is legal, although the defendant
not turned over to the sheriff in open court, and the sheriff had no written
rity to imprison the defendant. In re Calvin L. Moore, Habeas Corpus, 14
237, 7 O. C. D. 575.

Upon reversal by the common pleas court of the judgment of a justice of the
in a criminal case for error in the sentence alone, and remand for re-sentence,
justice has authority to re-sentence, notwithstanding the time has elapsed,
the trial, within which judgment must be rendered. Derby v. State, 6 C. C.
) 91, overruled in part. Yocheim v. State, 12 C. C. (N.S.) 430.

Under an ordinance imposing a fine not exceeding $10.00, a fine of $25.00 will be
sed. Pope v. Cincinnati, 3 C. C. 497, 2 O. C. D. 285.

Where a city ordinance imposes a greater penalty than it has power to impose
w, a sentence thereunder which was nevertheless within the amount allowed
w is valid. O'Brien v. Cleveland, 4 Dec. Rep. 189, 1 Clev. L Rep. 100.

f the bill of exceptions shows that the court sentenced the accused to thirty
imprisonment in the county jail, and then to one year in the Ohio penitentiary,
he journal shows that the sentence was only for imprisonment in the Ohio
entiary, the latter must prevail. Santo v. State, 17 C. C. (N.S.) 110.

A sentence committing the defendant "until said fine and costs are paid,"
ut any addition for the release of the prisoner is incomplete and habeas corpus
ie. In re Moore, 14 C. C. 237, 7 O. C. D. 576.

Voluntary surrender to the sheriff and imprisonment in accordance with the
nce is legal although the prisoner is not delivered to the sheriff in open court,
he sheriff has no written authority to imprison. In re Moore, Habeas Corpus,
C. 237, 7 O. C. D. 576.

The pronouncing of judgment in a criminal case may be delayed for a reasonable
to hear and determine a motion for a new trial or to give the defendant time
rfect an appeal or writ of error, or for other proper causes; but in the absence
permissive statute a trial court can not suspend indefinitely the pronouncing of
nce or the execution of judgment. Weber v. State, 58 O. S. 616, not followed.
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cases is to be construed as a limitation of power as well as the conferring of
r. State v. Radcliffe, 18 N. P. (N.S.) 273.

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For a discussion of the circumstances to be considered in imposing a sen upon one who has pleaded guilty to an indictment for manslaughter, see Sta Sutley, 9 O. L. R. 111, 56 Bull. 430.

Indictment lost.—If, after conviction, the indictment be stolen from files, its place may be supplied by copy, like lost instruments or pleadings. presence of the original indictment is not indispensable to the sentence o prisoner. Mount v. State, 14 O. 295.

Revising sentence.—Where a court, in passing sentence for a misdeme has acted under a misapprehension of the facts necessary and proper to be k in fixing the amount of the penalty, it may, in the exercise of judicial disc and in furtherance of justice, at the same term, and before the original se has gone into operation or any action has been had upon it, revise and inc or diminish such sentence within the limits authorized by law. Lee v. S 32 O. S. 113.

In the absence of anything on the record showing what the facts were, were misapprehended, or upon which the court acted in making such revision sentence, the reviewing court will presume that the court below acted upon cient and valid information, such as would have been proper to have, in fixin first sentence, and was in the exercise of a sound judicial discretion, and in fu ance of justice, and the due administration thereof. Lee v. State, 32 O. S. 1

It is no objection to a resentence of one whose first sentence has been rev by a reviewing court and the cause remanded for resentence, that the plaint error has suffered some part of the original erroneous sentence. Grossner v. S 18 C. C. (N.S.) 46 (affirmed, 86 O. S. 318).

Upon reversal by the common pleas court of the judgment of a justice o peace in a criminal case for error in the sentence alone, and remand for resen the justice has authority to resentence, notwithstanding the time has elapsed, the trial, within which judgment must be rendered. Derby v. State, 6 C. C. (91, overruled in part. Yocheim v. State, 12 C. C. (N.S.) 430.

Where a court, in passing sentence for a felony or a misdemeanor, has under a misapprehension of the facts necessary and proper to be known in the amount of the penalty, it may, in the exercise of judicial discretion a furtherance of justice, at the same term, and before the original sentence has into operation or any action has been had upon it, revise and increase or dim such sentence within the limits authorized by law. The journal is the p evidence of the sentence actually imposed in a criminal case, and it can n contradicted by a bill of exceptions. Santo v. State, 17 C. C. (N.S.) 110.

When the defendant has been taken to prison, a police judge has no rig bring the prisoner back and impose a heavier fine. In re Habeas Corpus, 7 N. P 5 O. D. 571.

Several counts.—Where an indictment contains two counts for the offense, one good, the other defective, upon a general verdict of guilty, judg may be given on the valid count. Turk v. State, 7 O. 528.

Although, on an indictment containing several counts, some of which ar fective, and one of which is good, a general verdict of guilty will be held to to the good count and support the indictment, yet such general verdict wil authorize separate penalties upon separate counts. Buck v. State, 1 O. S

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Where an offense forms but one transaction, and the indictment contains eral counts on which the jury have returned a verdict of guilty, it is error sentence on each count separately. Woodford v. State, 1 O. S. 427.

Where the court has passed separate sentences on the defendant on two counts an indictment, on one of which counts he has been found guilty, and on the r of which he has been acquitted, and has made the sentence on which he was mitted to commence at the expiration of his term on the count on which he was convicted, the whole judgment must be reversed. Woodford v. State, 1 O. S.

Where the clerk of the court has placed on the margin opposite the several ts the numbers one, two, and so on, and by mistake or otherwise has commenced number on the second count, and the same error has been continued through whole of the counts, and the jury have returned a verdict of guilty on the nth and eighth counts, as marked, it is error for the court to sentence the ndant on the seventh and eighth counts of the indictment, being the sixth seventh counts as marked. Woodford v. State, 1 O. S. 427.

Where the defendant is found guilty upon several distinct counts of an in- ment, some of which are bad and some good, a judgment and sentence in gen- terms, on such a verdict, is not erroneous, providing the sentence be proper warranted by the laws applicable to the good counts. Bailey v. State, 4 O. S.

Where an indictment charges a burglary and an actual larceny of the goods in store entered, and a verdict of "guilty of the burglary as charged" is rendered, court may sentence the accused for that crime, although the verdict does not ond to the charge of larceny made in the same count. Breese v. State, 12 O. S.

The general verdict of guilty where the indictment contains two counts charging inct misdemeanors will authorize a sentence upon each count. Eldredge v. State, . S. 191.

The second section of the statute (82 O. L. 237), known as the habitual crim- act, is sufficiently definite to authorize the indictment of a person charged, rding to its provisions, with the commission of a third felony, his trial and viction therefor, and his sentence to imprisonment in the penitentiary of the e during his natural life. Blackburn v. State, 50 O. S. 428. Effect of sub- ent legislation, cited. In re Kline, 70 O. S. 27 (approved, Moore v. Missouri, U. S. 677).

Where the first count of an indictment charges the defendant with keeping a e where intoxicating liquors are "kept for sale, given away, or furnished for erage purposes," in violation of § 4364-20b, Revised Statutes (G. C. § 13232), the second count charges him with keeping a place where intoxicating liquors sold in violation of § 6942, Revised Statutes (G. C. § 13195), each count covering same period of time, and the evidence at the trial establishes the fact that dur- all such period, the defendant was the keeper of but one place where intoxicat- liquors were sold, there is but one offense, and it is error for the court, on a dict of guilty under each count, to inflict the penalties prescribed by each of l sections. Weaver v. State, 74 O. S. 53.

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Where, upon the trial of a person charged by indictment with shootin intent to kill and shooting with intent to wound, the court properly charg jury upon all issues in the case, except that it inadvertently omits to charg the defendant might, if the evidence warrants, be found not guilty of shootin intent to wound, but guilty of assault and battery, and the court's attention called to this omission and no request to give such a charge is made, a jud of conviction of the accused of shooting with intent to wound should not be re for such inadvertent omission of the court to so charge. State v. McCoy, 88 447.

At the trial of one who is charged with forging a certain instrument, with ing and publishing the same false and forged instrument and obtaining a sum by false pretenses, it is proper to charge, "The defendant can not be co of obtaining money under false pretenses on the third count as charged i indictment, unless this check was forged or altered at the time he presente the bank. False pretenses consist in making a representation to another existing fact, which the party making it knows to be false at the time, wi intent that the party to whom they are made should act upon them and the must act upon them to its detriment;" but if the jury find that the accused guilty of forgery and not guilty of uttering and publishing a false instrume the only evidence of obtaining money under false pretenses is evidence tend show that the accused presented a check to the bank and obtained money t after having forged the same or knowing it to be forged, it is error to judgment upon a verdict of guilty. Griffith v. State, 93 O. S. 294.

Where an indictment contains two distinct counts, the first charging the ant with the forgery of the note, and the second count charging her with utt forged promissory note, and a verdict of guilty is rendered against her o charge, and it clearly appears from the record, though not charged in the ment, that both counts relate to one and the same note, a separate sente each count is erroneous, and the defendant should be sentenced upon the as for the single crime of forgery. Devere v. State, 5 C. C. 511, 3 O. C. D. 24.

Several crimes.—Where a party is convicted at the same term of crimes, each punishable by imprisonment in the penitentiary, it is not er sentencing the defendant, to make one term of imprisonment commence another terminates. But where the sentence, as shown by the record, is prisonment in the penitentiary "for a further term of years, to commence expiration of the sentence aforesaid," and there is nothing in the record s to what the term "aforesaid" relates, such judgment and sentence shall versed for uncertainty. Willliams v. State, 18 O. S. 46.

Several terms of imprisonment.—The terms of a sentence of im ment ought to be so definite and certain as to advise the prisoner and the charged with the execution of the sentence of the time of its commenceme termination, without being required to inspect the records of any other co the records of any other case. Picket v. State, 22 O. S. 405; Larney v. Cleveland, 34 O. S. 599.

Where the sentence, as shown by the record, is to imprisonment in th tentiary "for a further term of ten years to commence at the expiration sentence aforesaid," and there is nothing in the record showing to what th

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resaid" relates, such judgment and sentence will be reversed for uncertainty. iams v. State, 18 O. S. 46.

A sentence of imprisonment "to commence after the expiration of former ence" is too uncertain and indefinite. Larney v. Cleveland, 34 O. S. 599.

Where the court in passing separate sentences on several counts of an indict-t, makes a sentence on a count on which the defendant was convicted to com-ce at the expiration of his sentence on a count on which he was not con-d, the whole judgment must be reversed. Woodford v. State, 1 O. S. 427.

. 13696. Testimony after verdict or confession, to mitigate penalty.

When a person is convicted of an offense punishable, either in ole or in part, by a fine, the court, by motion, may hear testimony nitigation of the sentence. The court shall hear such testimony the term at which the motion is made, or may continue the case he next term on like terms as the case might have been continued ore verdict or confession. The prosecuting attorney shall attend h proceedings on behalf of the state, and offer testimony neces-y to give the court a true understanding of such case. (R. S. 320; 66 v. 313, § 171; S. & C. 1194.)

As to the right of a court to increase or diminish a sentence originally passed er a misapprehension of the case, see Lee v. State, 32 O. S. 113.

Where a court in passing sentence for a felony or a misdemeanor has acted er a misapprehension of the facts necessary and proper to be known in fixing amount of the penalty, it may, in the exercise of judicial discretion and in herance of justice, at the same term, and before the original sentence has gone operation or any action has been had upon it, revise and increase or diminish sentence within the limits authorized by law. Santo v. State, 17 C C. S.) 110.

In passing upon a motion for a new trial on the ground of newly discovered lence, the court can not reduce the sentence on the ground that the accused overcome his bad habits and has been punished sufficiently. Such facts may be sidered by the pardoning power, but not by the judicial power. McLaughlin State, 20 C. C. (N.S.) 492.

Entry—Sentence pronounced on verdict.

(Title.) Indictment for ———.

The defendant herein, having been heretofore convicted of ———, was this brought into court, in custody of the sheriff, and informed by the court of the dict of the jury, and inquired of if he had anything to say why judgment uld not be pronounced against him; and having nothing but what he hath eady said (or, and showing no good and sufficient cause why judgment should be pronounced):

It is, therefore, considered and adjudged by the court, etc.

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Journal entry in court upon trial and judgment when jury is waived

(Title.) Information for petit larceny.

This day came into court the prosecuting attorney, on behalf of the S Ohio, as also the said defendant, E F, who, being duly arraigned at the bar said court, and examined of and concerning the charge contained in the i tion aforesaid, as to how he will acquit himself thereof, for plea thereto sai he is not guilty, and waives his right of trial by jury. And the court pro the hearing of the cause, and after hearing the testimony of witnesses and liberation thereon had, it is adjudged by the court that the said defendan convicted of the charge in the information, and thereupon it is considered court that the said defendant, (etc., giving sentence).

(When sentence is suspended and bail given, add:)

And the said defendant now giving notice of his intention to apply for of error, on motion, it is ordered that, upon a recognizance being given by t C D, in the sum of $———, with security to the approval of the cou clerk), conditioned according to law, the execution of the sentence herein pended until (state time).

(When sentence is suspended and bail not given, add:)

And the said defendant giving notice of his intention to apply for a error, on motion, it is ordered that the execution of the sentence herein be su until ———; and that the said C D be committed to the custody of the sh be imprisoned until such time as the said matter shall be disposed of.

Entry—Order carrying suspended sentence into execution.

(Title.) Indictment for ———.

The defendant in this case having been sentenced at the last (or, at the f term of this court, and the sentence having been then suspended, on motion defendant, and no writ of error upon said judgment having been allowed (said judgment having been affirmed by the supreme court, to which a writ o was taken), it is, therefore, ordered that the said sentence be now carri execution.

Sentence pronounced on plea of guilty.

(Title.) Indictment for ———.

The defendant herein having on a former day of this term, entered a guilty to the charge of the indictment in this case, was this day brought int in the custody of the sheriff; and (the court having heard the testimony a and being fully advised in the premises, and the said defendant) being inqui etc. (Conclude from * as in first form.)

FORMS OF SENTENCE.

Imposing a fine.

That the said defendant, E F, pay the fine of ——— dollars, and the this prosecution, taxed at ——— dollars, and execution is awarded for the s

Imposing fine and order committing until paid.

That the said defendant, E F, pay the fine of ——— dollars and the cost prosecution, and that he stand committed to the jail of ——— county (workhouse of the city of ———), until the said fine and costs are paid, or s to be paid or until he be discharged therefrom by allowing a credit of sixt

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er day on such fine and costs for each day of confinement in such jail (or, work-ouse), or until he be otherwise discharged according to law.

Sending to jail or workhouse.

That the said C D be imprisoned in the jail of ——— county (or, the work-ouse of the city of ———), and kept at hard labor for the term of ——— ionths; and that he pay the costs of this prosecution, for which execution is warded.

Sending to the penitentiary.

That the said defendant, C D, be imprisoned and confined in the penitentiary f the state, and kept at hard labor, but without any solitary confinement (or, ept at hard labor for the period of ———, and also kept in solitary confinement the cells of the penitentiary, without labor), for the period of ———; and that e pay the costs of this prosecution, for which execution is awarded.

Sec. 13697. Duties of clerk when term of convict is not fixed.

The clerk of a court by which a criminal has been sentenced to the enitentiary, if the term of such sentence is not fixed by the court, shall urnish the warden a record containing a copy of the indictment and f any special plea, the name and residence of the judge presiding at he trial and of the jurors and witnesses sworn on the trial, with a state-nent of any fact or facts which the presiding judge may deem necessary or the full comprehension of the case together with his reasons for in-licting the sentence. The clerk shall be entitled to such compensation or such record as the presiding judge certifies to be just and shall be aid by the county wherein the trial was held. Upon such sentence the lerk shall forthwith transmit to the warden of the penitentiary a notice hereof. (81 v. 74, § 6; R. S. 7388-7.)

The indeterminate sentence act of 1913 (G. C. § 2166) should be applied rospectively. It was not intended to apply to prior offenses, and if it was so ntended it would be an ex post facto law and to that extent invalid. Francis . State, 4 O. A. R. 465.

EXECUTION OF SENTENCE SUSPENDED.

Sec. 13698. Execution of sentence; when and how long may be suspended.

When a person has been convicted of an offense, and gives notice to the court of his intention to file, or apply for leave to file, a etition in error, such court, on his application, may suspend execu-ion of the sentence or judgment against him until the next term f the court, or for such period, not beyond the session, as will ive him a reasonable time to apply for such leave. (R. S. § 7321; 8 v. 565; 66 v. 313, § 172; 68 v. 5, § 172; S. & C. 1189.)

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A sentence may be suspended in whole or in part by every court havin jurisdiction whether consented or not by the defendant. Weber v. State, 58 O. S

If a sentence is made upon conditions, suspension will stand as long conditions are complied with. If made without express conditions, the cour set aside the suspension at any time upon its motion during the same ter order sentence to be executed. Id.

After verdict of guilty in a criminal case and before sentence, the cour in its discretion, admit the prisoner to bail, except for capital offenses, whe proof is evident or the presumption great. Hampton v. State, 42 O. S. 401

In a criminal case pending on error in the circuit court, the supreme has no power under the constitution, to hear and entertain a motion to s an execution of sentence; but the circuit court has such power. Webster v. 43 O. S. 696.

The pronouncing of judgment in a criminal case may be delayed for a r able time to hear and determine a motion for a new trial, or to give the def time to perfect an appeal or writ of error, or for other proper causes; but absence of a permissive statute a trial court can not suspend indefinite pronouncing of sentence or the execution of judgment. Weber v. State, 58 616, not followed. State v. Radcliffe, 18 N. P. (N.S.) 273.

The court has no inherent power to suspend sentence in a criminal That doctrine belongs to the common law which was never in force in O the subject of crimes and procedure. The power now given by statute to s sentences in certain cases is to be construed as a limitation of power as the conferring of power. State v. Radcliffe, 18 N. P. (N.S.) 273.

This section and the two following sections apply solely to the susp of the execution of sentence in case of conviction in the court of common and do not apply to the suspension in error cases from inferior tribunals. of Scio v. Hollis, 7 N. P. 281, 10 O. D. 99.

This is the only section conferring power upon the common pleas co suspend its own sentence, and it provides merely for a temporary susp for the purpose of affording the defendant a reasonable opportunity to f petition in error in the circuit court and to there secure a suspension execution of his sentence until that court disposes of his petition in error. v. Baker, 3 N. P. (N.S.) 622, 16 O. D. 326.

Entry—Suspending sentence for a felony.

(Title.) Indictment for ———.

This day came the defendant, E F, and gave notice by his attorney intention to file (or, apply for leave to file) a petition in error herein, a motion it is ordered that the execution of the sentence and judgment against the said defendant be suspended until ——— A. D. 19—, and that th defendant be committed to the custody of the sheriff, to be imprisoned unti suspension shall be disposed of, and to abide the further orders of this cou

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. 13699. Same.

In a case wherein judgment of conviction by the court of common as has been affirmed by the circuit court on error and remanded to common pleas court for execution of judgment and sentence, and person so convicted gives notice of his intention to apply for ve to file a petition in error in the supreme court, the common as court or the trial judge at chambers, on motion of such person, nade within three days after the rendition by the circuit court of judgment of affirmation, shall further suspend the execution of tence for a time sufficient to give him an opportunity to apply leave to file a petition in error in the supreme court, and to file but such sentence shall not be suspended more than thirty days. S. § 7321; 88 v. 565; 66 v. 313, § 172; 68 v. 5, § 172; S. & C. 1189.)

In a criminal case pending on error in the circuit court, this court has no er, under the constitution to hear and determine a motion to suspend the ution of sentence. The circuit court has such power. Webster v. State, 43 . 696.

. 13700. In what case recognizance required.

The execution of a sentence or judgment against a person sen- ced for a misdemeanor shall not be suspended unless he enter a ognizance, with surety approved by the court, that he will appear the next term of such court and from term to term thereafter il the case in error is determined, and abide the judgment or tence of the court. (R. S. § 7322; 66 v. 313, § 173; S. & C. 1189.)

See § 13757.

In a criminal case "except for capital offenses where the proof is evident he presumption great" (Const. Art. I, § 9), after a verdict of guilty and before ence, the court may in its discretion, take a recognizance for the appearance he prisoner to abide the judgment of the court. Hampton v. State, 42 O. S. 401. Where a judgment of imprisonment is suspended to permit the defendant to e the city and he fails to leave, he may be arrested and confined as provided he judgment. Bird v. Cincinnati, 9 Dec. Rep. 301, 12 Bull. 101.

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Entry suspending sentence for misdemeanor.

This day came the defendant, E F, and gave notice by his attorney of tention to file (or, apply for leave to file) a petition in error herein, and tion it is ordered that the execution of the sentence and judgment against t defendant herein be suspended until the next term of this court, and that t defendant enter into a recognizance with security to the approval of the cou ditioned according to law.

Thereupon the said defendant entered into such recognizance as so o with ——— as his surety, and the same is hereby approved by the court, a cause is continued until the next term of this court.

Bond on suspension of execution of sentence.

State of Ohio, ——— county, ss.

Be it remembered, that on the ——— day of ———, A. D. 19—, per appeared E F and G H, and jointly and severally acknowledged themselves the State of Ohio the sum of ——— dollars, to be levied of their goods an tels, lands and tenements, if default be made in the condition following, Whereas, the said E F has given notice to the court of his intention to apply supreme court of Ohio (or, the circuit court of ——— county), for leave t petition in error against the State of Ohio, to obtain a reversal of a ju rendered against him in the court of common pleas of the county of ——— ——— term, A. D. 19—, in a certain action of indictment wherein the S Ohio was plaintiff, and the said E F defendant.

Now the condition of the above obligation is such, that if the said E personally be and appear before the said court of common pleas on the fi of the next term thereof and from term to term (or, on the ——— day of A. D. 19—, and from day to day), until the case in error of the prosecu which said E F has given notice, has been determined, and will abide the ju of the court, and at no time depart without leave, then this recognizance s void; otherwise it shall be and remain in full force and virtue of law.

E F. [SEA
G H. [SEA

Taken, signed, and acknowledged by order of court on the day and yea written.

Sec. 13701. When writ not allowed.

If execution of sentence is not suspended by the next term court after the sentence was pronounced, the court, at such term carry it into execution. (R. S. § 7323; 66 v. 313, § 174.)

Sec. 13702. When judgment is affirmed.

If a petition in error is filed and execution is suspended, and, hearing, the judgment of the court in which the trial was held aff such court shall carry into execution the sentence pronounced a the defendant at the next term after such judgment of affirma rendered. (R. S. § 7324; 66 v. 313, § 175; S. & C. 1189.)

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Entry—Suspended sentence carried into execution.

(Title) Indictment for ———.

This day this cause came on to be heard upon the motion of the prosecuting rney to enforce the sentence of the court against the said defendant, E F, tofore suspended by proceedings in error, and it being made to appear to the t that no writ of error upon said judgment has been allowed (or, that the said ment has been affirmed by the ——— court), it is therefore ordered that the sentence against the said defendant now be carried into execution.

. 13703. Imprisonment, recapture.

When a person is sentenced for a felony and execution of such sen-ce is suspended, the court shall order him into the custody of the riff to be imprisoned until the case is disposed of. If a person escape r sentence and before confinement in the penitentiary, the clerk of court, on application of the prosecuting attorney, shall issue a war-t stating such conviction and sentence, and commanding the sheriff ursue such person into any county in the state. (R. S. § 7325; 66 v. , § 176; 74 v. 354, § 14; 76 v. 98, § 1; S. & C. 1189.)

Custody pending error proceedings, see also § 13758.

After a verdict of guilty, in a criminal case, and before sentence, the court, in exercise of a wise judicial discretion, may admit the prisoner to bail, "except capital offenses, where the proof is evident or the presumption great." Hamp-v. State, 42 O. S. 401.

Where a convict escapes and is convicted and sentenced for another crime, he on the expiration of the latter sentence be held to serve out the rest of the sentence. Henderson v. James, 52 O. S. 242, 254.

. 13704. Duty of court and sheriff.

The sheriff shall take the person so escaping, and make return there-to the court in which the sentence was passed, if in session, and, if in session, he shall again commit him to the jail of the county, make urn thereof, and bring him before such court at the next session reof. The court shall set aside the former sentence and again pro-nce the judgment of the law upon the verdict, which shall be carried execution as provided in this chapter. (R. S. § 7325; 66 v. 313, 76; 74 v. 354, § 14; 76 v. 98, § 1; S. & C. 1189.)

Entry—Resentence of an escaped prisoner.

(Title.) Indictment for ———.

This day the said defendant, E F, was brought into court in the custody of the iff, the said defendant having heretofore been convicted herein and sentenced he court, but not yet confined in the penitentiary under the said sentence, the defendant having escaped from custody, and the court, therefore, does set e the former sentence. And the said defendant being asked by the court ther he had anything to say why judgment should not be pronounced against and showing no sufficient cause why such judgment should not be pro-

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nounced, it is therefore adjudged and decreed by the court, that the said defe (here follow the appropriate form of sentence as given under § 13696).

Sec. 13705. Fugitive from reformatory or boys' industrial sc

If a convict escape from the penitentiary, Ohio state reform or boys' industrial school, the time such convict is so absent shall be credited as a part of the time for which such convict was tenced. (R. S. § 7325; 66 v. 313, § 176; 74 v. 354, § 14; 76 v § 1; S. & C. 1189.)

An escaped convict who is convicted and sentenced to the penitentiar another crime, may, at the expiration of the latter sentence, be held to serv the remainder of his first sentence. Henderson v. James, 52 O. S. 242.

PROBATION.

Sec. 13706. Certain prisoners may be put upon probation.

In prosecutions for crime, except as hereinafter provided, w the defendant has pleaded or been found guilty, and the cour magistrate has power to sentence such defendant to be confined i committed to the penitentiary, the reformatory, a jail, workhous correctional institution, and the defendant has never before been prisoned for crime, either in this state or elsewhere, and it appea the satisfaction of the court or magistrate that the character of defendant and circumstances of the case are such that he is not li again to engage in an offensive course of conduct, and that the pu good does not demand or require that he shall suffer the penalty posed by law, such court or magistrate may suspend the executio the sentence and place the defendant on probation in the ma provided by law. (99 v. 339, § 1.)

Entry placing defendant on probation.

(Title.) It being made to appear to the court that the defendant E F never before been imprisoned for crime and that the character of the defe and the circumstances of the case are such that he is not likely again to e in an offensive or unlawful course of conduct and that the general public does not demand or require that the defendant should suffer the penalty im by law, the execution of the sentence is hereby suspended and the said defe E F is hereby placed on probation.

Sec. 13707. Juvenile delinquent.

This subdivision of this chapter shall not affect the laws provi the method of dealing with juvenile delinquents, nor shall deten in an institution for such juvenile delinquents be considered as prisonment. (99 v. 339, § 1.)

Sec. 13708. Exceptions thereto.

No person convicted of murder, arson, burglary of an inhab dwelling house, incest, sodomy, rape without consent, assault with

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ıt to rape, or administering poison shall have the benefit of proba-
n. (99 v. 340, § 2.)

:. 13709. Duty of clerk.

When it is the judgment of the court that the defendant be placed
on probation and under the supervision of the penitentiary or the
ormatory, the clerk of such court shall forthwith make a full copy of
judgment of the court, with the order for the suspension of the exe-
ion of sentence thereunder and the reasons therefor, and certify
m to the warden of the penitentiary or to the superintendent of the
ormatory, to which the court would have committed the defendant
for the suspension of sentence. (99 v. 340, § 5.)

:. 13710. When prisoner released.

Upon entry in the records of the court of the order for the probation
vided for in the next preceding section, the defendant shall be re-
sed from custody of the court as soon as the requirements and con-
ions required by the board of managers have been properly and
ly met. (99 v. 340, § 5.)

:. 13711. Probation of prisoners sentenced to jail or workhouse.

When the sentence of the court or magistrate is that the defendant
imprisoned in a workhouse, jail, or other institution, except the peni-
tiary or the reformatory, or that the defendant be fined and commit-
until such fine be paid, the court or magistrate may suspend the
cution of said sentence and place the defendant on probation, and in
ırge of a probation officer named in such order, in the following
nner.

1. In case of sentence to a workhouse, jail or other correctional
titution, the court or magistrate may suspend the execution of the
tence and direct that such suspension continue for such time, not ex-
ding two years, and upon such terms and conditions as it shall de-
mine;

2. In case of a judgment of imprisonment until a fine is paid, the
ırt may direct that the execution of the sentence be suspended on
h terms as it may determine and shall place the defendant on proba-
n to the end that said defendant may be given the opportunity to
such fine within a reasonable time; provided, that upon payment
such fine, judgment shall be satisfied and the probation cease. (99
341, § 10.)

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Sec. 13712. Probation officers appointed.

In cases of probation provided for in the next preceding section, order for probation shall be issued, unless the court or magistrate desi nate some suitable person to act as probation officer in such case, wl shall make written reports, at designated periods not less than on each month concerning the conduct of a probationer in his charg (99 v. 342, § 11.)

Sec. 13713. His duties.

A probation officer shall be entitled to necessary expenses in tl performance of his duty, and, for cause hereafter named, witho warrant or other process, at any time until the final disposition the case, may re-arrest a person so placed in his care, and brir him before the court; or the court or magistrate, may issue a wa rant for the re-arrest of such person and thereupon revoke ar terminate such probation, if the interest of justice requires, and the court or magistrate has reason to believe from the report of probation officer or otherwise that the probationer is violating tl conditions of his probation, engaging in a criminal practice, or h become abandoned to improper associates or a vicious life. (99 342, § 11.)

Sec. 13714. New sentence.

Upon such revocation and termination, the court or magistra may pronounce judgment at any time after such suspension with the longest period for which the defendant might have been se tenced, whereupon the judgment shall be in full force and effe and the person shall be delivered over to the proper officer to ser his sentence. (99 v. 342, § 11.)

A judge has no authority to set aside a sentence which he has thereto suspended, if the period covered by the sentence as originally pronounced expired. In re Pontius, 26 C. C. (N.S.) 178.

Sec. 13715. Revocation of sentence.

The court or magistrate, at any time during the term of probati may revoke or modify its order of execution of sentence, and, at a

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time, when the ends of justice will be subserved thereby and the good conduct and reform of the person so held in probation shall warrant it, may terminate the period of probation and discharge the person so held. If the court or magistrate has not revoked the order of probation, the defendant, at the end of the term of probation, shall be discharged. (99 v. 342, § 11.)

EXECUTION OF SENTENCE FOR MISDEMEANOR.

Sec. 13716. How convict to be confined in jail.

When a person convicted of an offense is sentenced to imprisonment in jail, the court or magistrate shall order him into the custody of the sheriff or constable, who shall deliver him, with the record of his conviction, to the jailer, in whose custody he shall remain, in the jail of the county, until the term of his imprisonment expires or he is otherwise legally discharged. (R. S. § 7326; 66 v. 314, § 179.)

If the police court had jurisdiction to render the judgment and issue the process, the fact that the mittimus does not properly describe the offense, or allege that the act was wilfully done, does not, under the provisions of the habeas corpus law, authorize the court to discharge the relator. State, ex rel., v. Hamilton, 3 C. C. 10, 2 O. C. D. 6.

A mittimus is not necessary to hold a prisoner committed to the workhouse when the officer bringing him has a transcript. In re Workhouse, 7 N. P. 554, 5 O. D. 574.

Sec. 13717. Payment of fine and costs; credit, sixty cents per day.

When a fine is the whole or part of a sentence, the court or magistrate may order that the person sentenced remain imprisoned in jail until such fine and costs are paid, or secured to be paid, or he is otherwise legally discharged, provided that the person so imprisoned shall receive credit upon such fine and costs at the rate of sixty cents per day for each day's imprisonment. (101 v. 41; R. S. § 7327; 66 v. 314, § 180; 60 v. 66, § 1; S. & S. 610.)

Cited in Mitchell v. State, 42 O. S. 383.

A fine payable in a state case is not capable of being compounded or released by the county commissioners although payable into the county treasury. In re Moore, 14 C. C. 241, 7 O. C. D. 575.

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Sections 5 and 10 of article I of the constitution which guarantee public by jury, do not apply to prosecutions under ordinances which authorize a pe by fine only upon a summmary conviction under a police regulation, or of an nance for an immoral practice prohibited by law (in this case a slot mac although imprisonment as a means of enforcing the payment of the fine is au ized. Fletcher v. State, 18 C. C. 674, 7 O. C. D. 316.

An order that the defendant stand committed until fine and costs be pa erroneous unless authorized by statute. Lougee v. State, 11 O. 68; Bons State, 11 O. 73.

The defendant can not be imprisoned for costs unless a fine is impos part of the penalty. Luetzler v. Perry, 18 C. C. 826, 9 O. C. D. 778.

Where the sentence omits the clause "or secured to be paid," such omission not render the sentence void. In re McAdams, 21 C. C. 450, 11 O. C. D. 780.

The sentence under this section should contain the words "or secured t paid or he be otherwise legally discharged," otherwise the judgment is equiv to a life sentence and illegal. Ex parte Mullaney, 10 O. D. 419.

This section authorizes a commitment until fine and costs are paid; a such were not the case the right to complain would be waived by payment. O v. State, 8 C. C. (N.S.) 93, 18 O. C. D. 620.

Where one is sentenced to pay the fine and costs of prosecution, he can be committed to the workhouse unless the sentence so provides, even though writ issued to the constable directs such confinement; but under G. C. § 13718 he be committed to the county jail. Young v. State, 11 C. C. (N.S.) 466, 21 O. C.

Under the provisions of § 6565, Revised Statutes (G. C. §§ 10359 to 10363 party on trial before a justice of the peace, charged with a misdemeanor which the justice has final jurisdiction, may except to his decisions upon ma of law arising in the case; and if such party except at the time of the deci he may request and have time, not exceeding ten days from the date of the deci within which to prepare and have signed his bill of exceptions. Said se embraces criminal as well as civil cases. State v. Langenstroer, 67 O. S. 7.

It is not essential to the jurisdiction of the court of common pleas to sider such bill of exceptions, that the transcript and original papers in the cas attached to the petition in error when the same is filed; but the filing of transcript, bill of exceptions and other necessary original papers, if within statutory period, give such reviewing court jurisdiction, and it may permit same to be attached before the cause is heard. State v. Ransick, 62 O. S. approved and followed. State v. Langenstroer, 67 O. S. 7.

The specific provisions of §§ 4364-30zg and 4364-30zh, Revised Statutes (G § 13246), control the prosecution of error proceedings brought to reverse a

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n for violation of any law prohibiting the sale of intoxicating liquors in any ory or district, or to reverse any judgment affirming such conviction, notwithing such provisions are inconsistent with more general provisions of other ns of the Revised Statutes. Mitchell v. State, 78 O. S. 347.

By force of the provisions of the above cited sections the allowance by one of the circuit court of a motion for leave to file a petition in error to re- a judgment of the court of common pleas affirming a judgment of conviction iolation of any law prohibiting the sale of intoxicating liquors, does not give ch court jurisdiction to try and determine the errors, complained of. Mitchell ate, 78 O. S. 347.

was tried and convicted by the mayor of an incorporated village, who had liction over the offense, for violating § 7033-1, Revised Statutes (G. C. 13047), prohibits the business of barbering on Sunday. He was sentenced to pay a f fifteen dollars and the costs of prosecution, and upon his refusal to pay the the mayor issued to the marshal of said village a mittimus, therein coming that the prisoner be committed to the county jail until said fine and be paid, without including the words "or secured to be paid," as provided 1836-793, Revised Statutes. Thereupon S applied to a judge of the court mmon pleas of the proper county for a writ of *habeas corpus*, and one was l. As the authority for holding S the said mittimus was submitted to the , who, being of the opinion that the mittimus was defective because of the ce of said words, on application for that purpose, gave leave to the mayor end the writ so as to include said omitted words. The amendment was made dingly, whereupon the petition for the writ of *habeas corpus* was dismissed. *Held*, it was not error to permit the amendment. Stanfeal v. State, 78 O. S.

t is the duty of the court in pronouncing judgment against the accused in a nal case to pronounce the judgment provided by law, and where a fine is part e penalty so provided and the court is authorized by law to commit the accused e workhouse "until such fine and the costs of prosecution are paid, or until discharged therefrom by allowing a credit of sixty cents per day on such and costs for each day of confinement in such workhouse, or be otherwise y discharged," a sentence providing and requiring that the accused "shall committed to such workhouse until the fine and costs are paid," without g thereto the further words of the statute "or until he be discharged there- by allowing a credit of sixty cents per day on such fine and costs," etc., while holly void is incomplete and erroneous, and where such sentence has not been ted, it will be reversed. Hamilton v. State, Clarke v. State, 78 O. S. 76.

The statutory provision that a convicted person may be imprisoned until his and costs are paid applies only to misdemeanors, and where such an error is a part of the sentence of one convicted of felony, error will lie to a refusal to nate that portion of the sentence. Smith v. State, 4 C. C. N. S. 101; 14 O. 140.

13718. Execution for fine and costs against property and body of offender.

When a magistrate or court renders judgment for a fine, an execu- may issue for such judgment and the costs of prosecution, to be

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levied on the property, or, in default thereof, upon the body o defendant. The officer holding such writ may arrest such defenda any county and commit him to the jail of the county in which such issued, until such fine and costs are paid, or secured to be paid, or otherwise legally discharged. (R. S. § 7328; 72 v. 53, § 1; S. & S.

The provisions of the act of April 7, 1863 (S. & S. 610, § 2), authorizi arrest on execution of a party against whom a fine has been adjudged, a imprisonment until such fine be paid, or he be otherwise discharged accord law, is not unconstitutional; and the provision applies to all cases where the is so adjudged to pay a fine, and it is not confined to cases where the pa adjudged to stand imprisoned until the fine and costs are paid. In the mat Albert Beall, 26 O. S. 195.

See Luetzler v. Perry, 18 C. C. 826; 9 O. C. D. 778.

Where the judgment makes no provision for imprisonment in case of d in the payment of the fine and costs and there is no property to satisfy the jud the accused should be committed to jail. Young v. State, 11 C. C. N. S. 4 O. C. D. 1.

Habeas corpus will not lie against the constable for the release of the d ant, at least until the constable has had a reasonable time to convey him t Young v. State, 11 C. C. N. S. 466; 20 O. C. D. 1.

Where a fine has been imposed by a court against a defendant on his con of a criminal offense, and the defendant dies before collection of such fine, part thereof, and before the same has been levied upon property of the defe such fine can not be collected from his estate after his death. State, ex Keifer, 16 N. P. (N.S.) 41, 24 O. D. (N.P.) 321 (affirmed by court of a without opinion).

Sec. 13719. Execution for same to sheriff of other county.

An execution, as provided in the next preceding section, may to the sheriff of any county in which the defendant resides, is or has property, and the sheriff shall execute the writ. If the de ant is taken, the sheriff shall commit him to the jail of the coun which the writ issued, and deliver a certified copy of the writ t sheriff of such county, who shall detain the offender until discharged as provided in such section. (R. S. § 7329; 72 v. 53,

EXECUTION OF SENTENCE FOR FELONY.

Sec. 13720. Five days' limit; exception.

A person sentenced to the penitentiary, or Ohio state reform unless the execution thereof is suspended, shall be conveyed t penitentiary or Ohio state reformatory by the sheriff of the c in which the conviction was had, within five days after such sen and delivered into the custody of the warden of the penitentia superintendent of the Ohio state reformatory, with a copy of sentence there to be kept until the term of his imprisonment ex or he is pardoned. If the execution of such sentence is suspe and the judgment be afterward affirmed, he shall be conveyed t penitentiary or Ohio state reformatory within five days afte

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ourt directs the execution of sentence; provided, however, that the rial judge, or any judge of said court in said subdivision may, in is discretion, and for good cause shown, extend the time of such onveyance. (101 v. 211; R. S. § 7330; 66 v. 313, § 177; S. & C. 916.)

This provision of the statute operates upon and is a necessary part of every entence. State, ex rel., v. Peters, 43 O. S. 629, 636.

The requirements of this section do not constitute a part of the judicial act of he court, but are imposed upon the sheriff and warden in the execution of the entence. Ib. 629, 648.

After sentence the sheriff is the legal custodian of the prisoner; and where he latter after sentence voluntarily places himself in the care of the sheriff, the mprisonment is legal, although the defendant was not turned over to the sheriff n open court and the latter had no written authority. In re Moore, 14 C. C. 37, 7 O. C. D. 576.

Sec. 13721. Sheriff may demand assistance during conveyance of convict.

During the time a sheriff is conveying to the penitentiary a person entenced to imprisonment therein, he may secure him in a jail and lemand the assistance of a sheriff, jailer, or other person in keeping uch prisoner, as if he were in his own county. Such sheriffs, jailers, r other persons shall be liable, on refusal, to like penalties as if the heriff, making the demand, were in his own county. (R. S. § 7331; 6 v. 314, § 178; S. & C. 916.)

Sec. 13722. Cost bill in case of felony to be made up and certified.

Upon sentence of a person for a felony, the officers, claiming costs nade in the prosecution, shall deliver to the clerk itemized bills thereof, who shall make and certify, under his hand and the seal of the ourt, a complete bill of the costs made in such prosecution, including he sum paid by the county commissioners for the arrest and return f the convict on the requisition of the governor, or on the request f the governor to the president of the United States. Such bill of ost shall be presented by such clerk to the prosecuting attorney, who hall examine each item therein charged, and certify to it if correct nd legal. (R. S. § 7332; 57 v. 55, § 1; 68 v. 75, §§ 1, 2; S. & C. 184; 79 v. 100; 95 v. 55.)

Cited in State v. Newell, 2 C. C. 204, 1 O. C. D. 444.

Costs do not include compensation for the services of expert witnesses. State, x rel., v. Guilbert, 77 O. S. 340.

Sec. 13723. Writs of execution to issue on sentence.

The clerk shall forthwith issue to the sheriff of the county in which the indictment was found, and to the sheriff of any other ounty in which the convict has property, executions against his roperty for the costs of prosecution, which shall be served and returned within ten days, with the proceedings of such sheriff or the want of property upon which to so levy, endorsed thereon. When a levy is made upon property under such execution, a writ shall forthwith be issued by the clerk for the sale thereof and such sheriff

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shall proceed to sell the property as in other cases, and make retur thereof according to law, and, after paying the costs of convictio execution and sale, pay the balance to the person authorized to r ceive it. (R. S. § 7333; 42 v. 30, §§ 1, 2, 5; S. & C. 1186, 1187.)

Cited, State, ex rel., v. Guilbert, 77 O. S. 333; State, ex rel., Outcalt Brewster, 1 C. C. 370, 1 O. C. D. 207; State v. Newell, et al., 2 C. C. 203, 1 C. D. 444.

A general pardon does not release the prisoner from the judgment for cost Libby v. Nicola, 21 O. S. 414.

An execution for costs in a criminal prosecution may be levied on the body the defendant only in cases where a fine is imposed as part of the penalty exce in cases where a person may be sent to the workhouse in an adjoining county und § 6801b, R. S. (G. C. §§ 12386, 12387). The imposition of the fine makes t costs a part of the sentence. Luetzler v. Perry, 18 C. C. 826, 9 O. C. D. 778.

Sec. 13724. Costs on execution of sentence for felony.

If the convict is sentenced to imprisonment in the penitentiary to death, and no property has been levied upon, the sheriff shall deliv such certified cost-bill, having accredited thereon the amount paid o costs, with the convict, to the warden of the penitentiary. When pro erty has been levied upon and remains unsold, the clerk shall not certif to the sheriff the costs of such conviction, or part thereof, for paymen from the state treasury, but the convict shall be delivered to such warde in pursuance of his sentence, upon payment of the costs of transport tion. (R. S. § 7334; 83 v. 136; 42 v. 30, §§ 2, 5; 57 v. 55, § 1; S. & 1184, 1186, 1187.)

Money received by a sheriff from the treasurer of state, upon a warrant the auditor issued in pursuance of a certificate of allowance given to said sheri by the warden of the penitentiary, is received by said sheriff in his official capacit and by virtue of his office; and his failure, on demand, to pay it over to the parti entitled thereto, is a breach of the condition of his official bond. State v. Newel 2 C. C. 203; 1 O. C. D. 444.

If it was not received by him in accordance with the strict letter of the stat tory provisions defining his duties as sheriff, yet it was received under color office, and his sureties are liable. *Ib.*

A general pardon does not release the prisoner from the judgment for cost Libby v. Nicola, 21 O. S. 414.

Sec. 13725. Number of guards, and fees for transportation of convict

In transporting convicts to the penitentiary, the sheriff may em ploy one guard for every two convicts transported; but the cour may authorize a larger number, in which case a transcript of th order of such court shall be certified by the clerk thereof, under th seal thereof, and the sheriff shall deliver it to the warden of th penitentiary with such convict. The sheriff shall receive eight cent

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r mile for mileage, five cents per mile for transporting each convict d six cents per mile for the service of each guard, the number of les to be computed by the usual route of travel. (R. S. § 7335; v. 55, § 1; S. & C. 1184.)

Cited in State v. Newell, 2 C. C. 203, 1 O. C. D. 444.

c. 13726. Warden shall certify correctness of cost-bill, etc.

When the clerk certifies on the cost-bill that execution was issued cording to the provisions of this chapter, and returned by the sheriff No goods, chattels, lands or tenements, found whereon to levy," the rden of the penitentiary shall allow so much of the cost-bill and arges for transportation as is correct, and certify such allowance, ich shall be paid by the state. (R. S. § 7336; 57 v. 55, § 1; 73 v. 43, 5; 42 v. 30, § 4; S. & C. 1184, 1187.)

Cited, State v. Newell, et al., 2 C. C. 203, 1 O. C. D. 444; State v. Hobson, N. P. 321, 5 O. D. 442.

A general pardon does not release the prisoner from the judgment for costs. by v. Nicola, 21 O. S. 414.

Under former statute it was held that a prosecuting attorney was not entitled ten per cent. of the costs paid to the order of the clerk of the common pleas rt under this section, and G. C. § 13727. State, ex rel., v. Brewster, 44 O. S. 249.

It is the duty of the warden under this section to allow and certify a cost bill, ich contains only such items of costs as the court has certified as accruing ring the trial, and such additional items as are the proper expenses of transting the convict to the penitentiary. State, ex rel., v. Coffin, 56 O. S. 240.

The allowance by the warden of so much of the cost bill and charges for transtation as is correct does not make it a purely ministerial duty of the auditor state to draw a warrant for its payment. State, ex rel., v. Guilbert, 77 O. S. 333.

Under the former statute it was held that the clerk of the common pleas court Cuyahoga county was entitled to ten per cent. of the fees paid to him out of the te treasury under this section. State, ex rel., v. Commissioners, 22 C. C. 57, O. C. D. 236.

c. 13727. When costs not made, etc., clerk to certify such fact to auditor of state.

Upon the return of the writ against the convict, if an amount of ney has not been made sufficient for the payment of the costs of viction, and no additional property is found whereon to levy, the rk shall so certify to the auditor of state, under his seal, with a tement of the total amount of costs, the amount made and the ount remaining unpaid. Such amount so unpaid as the auditor ds to be correct, shall be paid by the state, to the order of such rk. (R. S. § 7337; 42 v. 30, § 3; S. & C. 1187.)

EXECUTION OF DEATH SENTENCE.

c. 13728. Mode; execution; place.

A death sentence must be executed by causing a current of electric-, of sufficient intensity to cause death, to pass through the body of

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the convict. The application of such current must be continued such convict is dead, and the warden of the Ohio penitentiary, case of his death, inability or absence, a deputy warden shall b executioner. When a person shall be legally sentenced by a court so executed, such punishment must be inflicted within the walls Ohio penitentiary and within an enclosure to be prepared for that pose under the direction of such warden and the board of man thereof. Such enclosure shall be so constructed as to exclude view. (R. S. § 7338; 92 v. 159; 83 v. 145; 82 v. 169; 33 v. 33, S. & C. 417.)

Sec. 13729. Provisions governing—Time—Fee of executioner.

Executions of the death penalty shall take place according t provisions of this subdivision of this chapter on the day designat the court, passing sentence, before the hour of sunrise of such The warden or a deputy warden executing such sentence shall re for his services, fifty dollars to be paid out of the fund appropriat the maintenance and support of the Ohio penitentiary. (92 v. 159 R. S 7338-1.)

Entry—Death sentence.

That the defendant, E F, on the ——— day of ——— A. D. 19—, and the hour of sunrise of said day, within the walls of the Ohio penitentiary at bus, Ohio, be electrocuted by causing a current of electricity of sufficient in to cause death to pass through the body of the said defendant, the applicat such current to be continued until the said defendant is dead; and that t fendant be taken hence to the jail of ——— county, and that within the next days the sheriff of ——— county convey the said defendant E F, to the Ohio tentiary and deliver him to the warden thereof, and that at the time and place named the said warden cause a current of electricity of sufficient intensity to death, to pass through the body of the said defendant, the application of suc rent to be continued until the said defendant is dead; that the said defenda the costs of this prosecution and execution is awarded.

Sec. 13730. Conveyance of sentenced prisoner to the penitenti Sheriff's fees.

A writ for the execution of the death penalty shall be directed t sheriff by the court issuing it, and the sheriff of the county wherei prisoner has been convicted and sentenced, within thirty days t after and in a private and secure manner, shall convey the prison the Ohio penitentiary, where such prisoner shall be received b warden and kept until the day designated for his execution. For ducting such prisoner to the Ohio penitentiary, such sheriff shall re

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ike fees and mileage as is provided by law in other cases, when duly approved by such warden. (R. S. § 7339; 82 v. 169; 63 v. 65, § 1; S. & S. 616.)

Sec. 13731. Who may attend execution and death penalty.

The warden or his deputy and such number of guards as he thinks necessary, and only the following persons, may be present at the execution; the sheriff of the county in which the prisoner was tried and convicted, the board of managers and physician of the Ohio penitentiary, the clergyman in attendance upon such prisoner, and not more than three other persons to be designated by such prisoner, representatives of not exceeding three newspapers in the county where the crime was committed, and one reporter for each of the daily newspapers published in the city of Columbus. (R. S. § 7341; 84 v. 211; 83 v. 145; 82 v. 169; 66 v. 314, § 184; S. & C. 1191.)

Sec. 13732. Execution and return of warrant.

Unless a suspension of execution be ordered by the supreme court or two judges thereof, the warden or deputy warden shall proceed, at the time and place named in the warrant, to cause the prisoner under death sentence to be electrocuted as provided in this subdivision of this chapter. He shall forthwith make return to the clerk of the county, from whence the prisoner was sentenced, the manner of his execution of such warrant and his doings thereon. Such clerk shall record the warrant and the return in the records of the case. (R. S. § 7343; 92 v. 159; 83 v. 145; 82 v. 169; 63 v. 35, § 2; 66 v. 315, § 186; S. & S. 617.)

In a criminal case, pending on error in the circuit court, the supreme court has no power, under the constitution, to hear and determine a motion to suspend the execution of sentence. The circuit court has such power. Webster v. State, 43 O. S. 696.

For history of statutes prescribing the method of inflicting the death penalty, see Webster v. State, 43 O. S. 696.

Sec. 13733. Disposition of body of person executed; expenses of funeral.

The body of the executed person shall be returned for burial to friends in any county in the state that make written request therefor, if made to the warden the day before or on the morning of the execution. He may draw his order on the auditor of state, and he on the state treasurer, for paying the transportation and other funeral expenses, not to exceed fifty dollars; and if no request is made by such friends therefor, such body shall be disposed of as provided by law for such cases. (92 v. 159, § 3; 82 v. 170; R. S. § 7343-1.)

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Sec. 13734. When accused escapes, he may be re-arrested an ecuted.

If the accused escape, after sentence, and is not retaken befor time fixed for his execution, any sheriff may re-arrest and commi to the jail of the proper county and make return thereof to the in which the sentence was passed. Such court shall again fix the for execution, which shall be carried into effect as provided in chapter. (R. S. § 7344; 66 v. 322, § 224.)

CONVICT INSANE OR PREGNANT.

Sec. 13735. If convict appear insane, inquest to be had.

If a convict, sentenced to death, appears to be insane, the s shall forthwith give notice thereof to a judge of the court of co pleas of the judicial district, summon a jury of twelve impartial to inquire into such insanity at a time and place to be fixed by judge, and give immediate notice thereof to the prosecuting atto (R. S. § 7345; 66 v. 315, § 187.)

Cited in Sterling v. Drake, 29 O. S. 463.

Sec. 13736. Proceedings on the inquest.

The judge, clerk of the court and prosecuting attorney shall a the inquiry. Witnesses may be produced and examined before the and their finding shall be in writing and signed by them. If it be that the convict is insane, the judge shall suspend the execution the sheriff receives a warrant from the governor directing such e tion. The finding of such jury and order of such judge, certifi him, shall be entered on the journal of the court by the clerk. (§ 7346; 66 v. 315, § 188.)

Notice by sheriff.

(Title.) Indictment for ———.

To Hon. ———, judge of the common pleas court:

You are hereby notified that E F heretofore convicted of murder in th degree in the above cause in this court, and since sentenced to death, is appa insane, and you are therefore requested to fix a time and place for an inqu be held as to the sanity of the said prisoner.

———

Sheriff ——— county, O

Entry—Order for inquest of insanity.

(Title.) Indictment for ———.

This day came ———, sheriff of ——— county, Ohio, and suggested court that E F, heretofore convicted of murder of the first degree in the

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ause in this court, and heretofore sentenced to death, is apparently insane. It is herefore ordered that a jury be impaneled to make lawful inquiry into such in- anity, and that such inquest be held at the courthouse at ———, in said county, on he ——— day of ———, 19—, at ——— o'clock A. M.

Entry—Insanity found, and execution suspended.

(Title.) Indictment for ———.

The sheriff of this county having on a former day, to-wit; the ——— day of ———, 19—, given notice to the Hon. A H, one of the judges of this court, of the pparent insanity of the said E F, now came, before the said A H, judge, the prose- uting attorney, on behalf of the State of Ohio, the said E F, in charge of the sheriff, nd his attorney, S C; also came the following named persons, summoned as jurors y said sheriff, to-wit: (name jurors), who were duly impaneled and sworn to try he issues to them presented. And thereupon this cause came on further to be eard on the evidence touching the insanity of the said E F.

And the said jury having heard all the evidence, after consultation had thereon, resented their finding in writing, signed by themselves, as follows:

"We, the jury, find, upon the evidence, that the prisoner, E F,* is insane."

And thereupon the said A H, judge, made and certified the following order, o-wit:

"It is ordered upon the finding of the jury of the insanity of the prisoner, E , that execution of the sentence of death heretofore pronounced upon him be, and ereby is, suspended until a warrant shall be received from the governor of this tate directing such execution. And the said E F is remanded to the custody and afe-keeping of the said sheriff."

Entry—No insanity found.

(Title.) Indictment for ———.

(As in last to *, and conclude:) is of sound and sane mind."

And thereupon the said A H, judge, made and certified the following order, o-wit:

"It is ordered, upon the finding of the jury in these proceedings, that the said roceedings be dismissed without prejudice to the execution of the sentence of the ourt against the prisoner, E F."

Sec. 13737. When convict restored, governor to order execution.

The sheriff shall forthwith transmit a copy of such finding to the governor, who, when convinced that the convict is of sound mind, may issue a warrant appointing a time for his execution. (R. S. § 7347; 66 v. 315, § 189.)

Sec. 13738. Proceedings when a female convict appears pregnant.

If a female convict sentenced to death appear to be pregnant, the sheriff in like manner, shall summon a jury of six persons, who, on like proceedings as in the case of an insane convict, shall return a finding signed by them. (R. S. § 7348; 66 v. 315, § 190.)

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Sec. 13739. When convict no longer pregnant governor to ord execution.

If such jury find that such convict is with child, the sheriff, a like manner, shall suspend the execution of her sentence, and tra mit such finding to the governor, who, when satisfied that such co vict is no longer pregnant, shall issue a warrant appointing a day f her execution. (R. S. § 7349; 66 v. 315, § 191.)

CUMULATIVE SENTENCES.

Sec. 13740. Cumulative sentences to the workhouse.

When a person is convicted of a misdemeanor under the law of t state or an ordinance of a municipal corporation, and the tribunal b fore which such conviction is had is authorized by law to commit h to a workhouse, and a previous conviction for any such offense, this state or elsewhere, is proved against him, the sentence for the la offense shall be not less than double the penalty imposed for such pr vious offense. Where two previous convictions for such offenses a proven against the offender, the sentence shall be not less than doub the penalty imposed for the last of such previous offenses. This se tion shall not impose a penalty greater than the maximum now pr vided by law for such offenses. (90 v. 199, § 1; 86 v. 261; R. § 7349-1.)

Where a greater punishment may be inflicted on a conviction for a second subsequent violation of a criminal law, than for the first, the fact that the offe charged is a second or subsequent offense must be averred in the indictment information, in order to justify the increased punishment. Larney v. Clevela 34 O. S. 599.

For constitutionality, sufficiency of indictment, and form of sentence under former habitual criminal act, see Blackburn v. State, 50 O. S. 428.

If imprisonment for a felony was terminated by an unconditional pardon was not regarded as one of the two former imprisonments for felony required the habitual criminal act. State v. Martin, 59 O. S. 212.

One who is serving a sentence in the penitentiary under the habitual crimi act is not entitled since its repeal to be released on a writ of habeas corp In re Kline, 70 O. S. 25.

Sec. 13741. Sentence of "habitual offender."

Whoever, having been three times convicted and sentenced f offenses under the law of the state or an ordinance of a municip corporation, in this state or elsewhere, is convicted of an offense u der the law of the state or an ordinance of a municipal corporatio and the tribunal before which such conviction is had is authoriz by law to commit the offender to the workhouse, shall be an "hab ual offender" and may be imprisoned in a workhouse not less th one year nor more than three years. In such cases the court m order that such person shall stand committed to such workhou until the costs of prosecution are paid, or he is discharged as here after provided. Such repeated misdemeanors as provided in th section and the next preceding section, shall be charged in t information or complaint made against such offender and, if prove shall be stated in the commitment to the workhouse. (90 v. 19 § 1; 86 v. 261; R. S. § 7349-1.)

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ec. 13742. Power of court, etc.—Exceptions.

The next two preceding sections shall not confer power upon a urt, magistrate or mayor to sentence an offender to such workhouse om a county or municipality outside the municipality where such orkhouse is situated, except upon such terms and under such conditions are provided by law. If a person convicted under such sections, shows the satisfaction of the court, before which such conviction was had, at a pardon was granted for any of such offenses on the grounds of nocence, such conviction and sentence shall not come under the prosions of such sections. (90 v. 199, § 1; 86 v. 261; R. S. 7349-1.)

ec. 13743. When persons so imprisoned may be paroled.

A person so convicted and sentenced for a fourth or subsequent ofense, at the discretion of the directors or managers of the workhouse which he is imprisoned, may be permitted to go and remain outside f the walls thereof, on parole, under such rules and regulations and on ich conditions as such directors or managers prescribe. A prisoner hile so paroled, shall be legally in the custody and under the control f such directors or managers, who, on their order, duly certified by eir secretary or chief clerk, may arrest him wherever found, and ring him back to such workhouse to serve out the full term for which was sentenced. (86 v. 261, § 2; R. S. 7349-2.)

ec. 13744. How cities or counties having no workhouse shall provide.

A person convicted and sentenced under this subdivision of this apter, shall be imprisoned in a workhouse, where, if possible, he shall employed in useful labor, and earn his living. City or county auorities, in counties not having workhouses, shall contract with the thorities of a city or county workhouse in the state for the care of ich prisoners, on such reasonable terms as may be agreed upon, and risoners so convicted and sentenced shall be sent to and imprisoned the workhouse so provided. (86 v. 261, § 3; R. S. 7349-3.)

The second section of the statute, passed May 4, 1885 (82 O. L. 237), known the habitual criminal act, is sufficiently definite to authorize the indictment of a rson charged, according to its provisions, with the commission of a third felony, s trial and conviction therefor, and his sentence to imprisonment in the penitenary of the state during his natural life. Blackburn v. State, 50 O. S. 428.

To authorize a sentence of imprisonment for life under that statute the indictent should allege that the defendant had been previously twice convicted, sentenced

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and imprisoned in some penal institution for felonies, describing each sep
In such case the grand jury, at the time it finds an indictment for the third
is authorized, if the evidence warrants it, to include in the indictment th
that the accused had been so convicted, sentenced and imprisoned; and if th
jury, in their verdict, find these facts to be true, and also convict him of th
felony, the court, after passing sentence of imprisonment for a specific te
prescribed by the statute, should proceed to sentence him to imprisonment
natural life. Blackburn v. State, 50 O. S. 429.

The statute does not create a new offense, but attaches an additional
to the commission of any felony, where the perpetrator thereof has been
previously convicted, sentenced and imprisoned on account of other felonie
mitted by him. Blackburn v. State, 50 O. S. 429.

The statute, in its operation, does not conflict with § 10 of article 1
constitution of the United States, prohibiting "*ex post facto*" laws, nor wi
of article 2 of constitution of this state, prohibiting "retroactive" laws, al
one or both, of the previous felonies, charged against him, was committed, a
imprisonment on account thereof inflicted, before the statute in questio
enacted. Blackburn v. State, 50 O. S. 429.

If imprisonment for a felony is terminated by an unconditional pardo
not to be regarded as one of the two former imprisonments for felony requ
§ 7388-11, Revised Statutes, to place the accused in the category of habitua
inals. State v. Martin, 59 O. S. 212.

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CHAPTER XII.

NEW TRIALS, MOTIONS IN ARREST AND ERROR.

TION

NEW TRIALS.

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NEW TRIALS.

c. 13745. For what causes a new trial granted.

A new trial, after a verdict of conviction, may be granted on the plication of the defendant, for any of the following causes affecting terially his substantial rights:

1. Irregularity in the proceedings of the court, jury, prosecuting orney, or the witness for the state, or for any order of the court or use of discretion by which the defendant was prevented from having air trial;

2. Misconduct of the jury, prosecuting attorney or the witnesses the state;

3. Accident or surprise which ordinary prudence could not have arded against;

4. That the verdict is not sustained by sufficient evidence, or is ntrary to law;

5. Newly discovered evidence material for the defendant, which he uld not, with reasonable diligence, have discovered and produced at e trial;

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6. Error of law occurring at the trial. (R. S. § 7350; 66 v. 316, § 192.)

Authority of courts.—Granting a new trial rests in the sound discretion of the court, and error will not lie unless the court's discretion is manifestly erroneous. Hurley v. State, 6 O. 399.

It is not necessary to file a motion for a new trial, where exceptions are taken before a justice to the method of impaneling the jury and to the introduction of testimony, in order to have these questions reviewed in the common pleas court. State v. Langenstroer, 67 O. S. 7.

For the circumstances under which a mayor or police judge may grant a new trial see Germantown v. Basore, 22 C. C. 417, 12 O. C D. 500; see also Williams v. State, 25 O. S. 628.

Nisi prius courts have, in the absence of statutes, power to grant new trials, but when the statute has provided the means and manner of application for new trials the courts must be governed thereby. State v. Thatcher, 12 O. D. 718.

The criminal code of Ohio nowhere provides that a prosecutor is authorized to file a motion for a new trial. State v. Thatcher, 12 O. D. 718.

A new trial will not be granted where the court erroneously refuses to sustain a challenge for cause, if the juror was excused on a peremptory challenge, and the defendant went to trial without exhausting his peremptory challenges. Mimms v. State, 16 O. S. 221; Erwin v. State, 29 O. S. 186.

It is otherwise where the defendant exhausted his peremptory challenges before a jury is secured. Hartnett v. State, 42 O. S. 568.

Where incompetent evidence is admitted upon the statement of counsel that other evidence would be produced which would make it competent, and such other evidence is not produced, and the court wholly withdraws the incompetent evidence from the jury and instructs them to disregard it, there is no error. Martin v. State, 17 C. C. 406, 9 O. C. D. 621.

Permitting a question to be answered as to whether a conversation has taken place, and afterwards determining whether it is admissible, is not erroneous. Moran v. State, 11 C. C. 464, 5 O. C. D. 234.

A mistrial should not be ordered in a cause simply because some error has intervened. The error must prejudicially affect the merits of the case and the substantial rights of one or both of the parties, and this is as true of the temporary absence of the judge as any other departure from due process of law during the trial of a cause. Tingue v. State, 90 O. S. 368.

If the trial judge is temporarily absent during a part of the argument, in order to prepare his charge for the jury, and it is not claimed that any misconduct of counsel took place during such absence, such absence, if erroneous, is not prejudicial to the defendant. Tingue v. State, 90 O. S. 368 (distinguishing Miller v. State, 73 O. S. 195).

In order that affidavits used on a motion for new trial may be considered by a reviewing court, there must be a certificate of the trial judge that the affidavits in question were all the evidence introduced on the hearing of the motion. Berman v. State, 16 C. C. (N.S.) 106, 25 O. C. D. 386 (affirmed, 81 O. S. 508).

Where a motion for a new trial is overruled and no exceptions taken thereto and a second motion for a new trial made on the ground of newly discovered evidence is also overruled, to which exceptions are taken and the case taken on

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or to the circuit court, the record of the entire case is before the court for iew. McLaughlin v. State, 20 C. C. (N.S.) 492.

A trial judge will not set aside a verdict of guilty because of failure to ablish venue, where the proof was to the effect that the offense charged was comtted in the city in which the judge resides and has resided for many years, but led to name the county and state. State v. Fritz, 11 N. P. (N.S.) 138.

The hearing of a motion for a new trial is not a part of the trial. The presence the hearing of such motion of one convicted of a crime is not necessary and is error for the trial judge to refuse to hear and determine same on account of e convict's absence. Armstrong v. State, 15 C. C. (N.S.) 368, 24 O. C. D. 384.

It is no ground for the reversal of a judgment, that a motion for a new trial is made, argued, and overruled in the absence of the prisoner, where no objection is made till after sentence. Griffin v. State, 34 O. S. 299.

Allowing evidence to be introduced out of its regular order rests in the sound scretion of the court, and is reviewable on error only when taken in connection th all the evidence in the case, it is shown to have prevented a fair trial. Webb State, 29 O. S. 351.

The action of the court in allowing the jury to have a writtten confession ade by the accused with them in their room while considering their verdict is t prejudicial error. State v. Knapp, 70 O. S. 380.

It is not the province of the court to classify witnesses, and give to the jury hat the experience of the courts may be in respect to such a class, but their edibility should be left to the jury, under all the competent facts and circumances of the case before it. State v. Tuttle, 67 O. S. 440.

The discretion exercised by the court as to the order in which testimony shall introduced must be a legal and proper discretion, and should not prejudice the ghts of the parties. Evidence of the acts or declarations of conspirators is not lmissible until there is other prima facie evidence of the conspiracy. Limerick State, 14 C. C. 207, 7 O. C. D. 669.

Where a judge sends to the jury on their request, in the absence of the prisoner, copy of the statutes of the state, it is a proper exercise of discretion. Gandolfo State, 11 O. S. 114.

Irregularity in the proceedings of the court.—An application for the ntinuance of a case is addressed to the sound discretion of the court, and its tion cannot be reversed on error, unless it clearly appears, from all the facts and rcumstances, that there has been an abuse of discretion, operating to the prejudice the party in the final determination of the case, when it may be a proper ground order a new trial. When the evidence in the case is not set out, so as to enable e appellate court to say that there has been such abuse of discretion and prejlice to the party, it will not interfere. Holt v. State, 11 O. S. 691.

Where a fact, material to the issue, concerning the existence of which there is nflict in the evidence, is assumed by the court, in the charge to the jury, to be lly established, the province of the jury is invaded, and prejudicial error is shown. ine v. State, 43 O. S. 332.

On the trial of a male person of the age of eighteen years or upwards, on an dictment for carnally knowing and abusing a female person under the age of xteen years, with her consent, it is error for the court to charge the jury, that A female person under sixteen years of age, who knowing it is wrong, consents an act of sexual intercourse with herself by a man above the age of eighteen ears, is an accomplice, and her testimony should be received with caution and

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very closely scrutinized before the jury acts upon it." It is also error for the court to say in that connection, and as a part of the above charge, that "the jury is warned that it is exceedingly unsafe to convict in any case upon the evidence of an accomplice unless the same is corroborated by other evidence which is reliable."

It is likewise error in such case for the court to charge the jury, that, "The experience of courts warns them to scan with caution and view with suspicion, the testimony of abandoned women; and if any such have testified in this case, it is your duty to apply the above warning."

It is further error in such case, for the court to charge that, "The conduct of abandoned women is often incomprehensible when tested by the standard applied to the generality of mankind; and if any such have testified in this case, you should be cautious in relying upon her evidence."

It is not the province of the court, to classify witnesses, and give to the jury what the experience of the courts may be in respect to such a class, but their credibility should be left to the jury, under all the competent facts and circumstances of the case before it. State v. Tuttle, 67 O. S. 440.

A cause is finally submitted to the jury, within the meaning of § 7312, Revised Statute (G. C. 13688), at such time as the court directs the jury to enter upon its deliberations, and not necessarily at the conclusion of the charge of the court to the jury. State v. Ferrell, 69 O. S. 521.

Where, at the conclusion of the reading of the court's charge the jurors are permitted to separate for the purpose of the noon meal, being at the time instructed that the cause has not then been finally submitted to them, and directed to return at 1:00 P. M. and retire to the jury room for deliberation, and being carefully admonished as to their conduct as provided in said section, and upon their return at the hour named the indictment, the court's written charge and blank verdicts are for the first time delivered to them, and they then retire to deliberate upon their verdict, the cause will be held to have been finally submitted at the hour of reassembling and not at the time of such separation, and in the absence of a showing that such separation has worked prejudice to the defendant the fact of separation will not be ground for a new trial. State v. Ferrell, 69 O. S. 521.

Where counsel for a defendant on trial for murder in the second degree, during the progress of such trial suggests to the court that the defendant is not then sane and presents to the court the certificate of a "respectable" physician to the same effect and demands that a special jury be impaneled to try the question whether or not such defendant is then sane it is error for the court to refuse such demand. And such error is not cured by the court thereafter, in its general charge to the jury trying said case, instructing said jury that: "If you think that you have not heard all of the truth in the case, because of defendant's mental condition and that you believe you are not justified because of that fact in finding him guilty, you may acquit him." State v. Roselot, 69 O. S. 91.

Where the accused has made a written confession, under oath, in which he admits the killing charged in the indictment against him and the confession contains admissions of other murders, the action of the court in permitting the jury to have the confessions with them in their room while considering upon their verdict is not prejudicial error. State v. Knapp, 70 O. S. 380.

On the trial of one indicted under § 6816, Revised Statutes (G. C. 12414), for carnally knowing and abusing a female person under sixteen years of age with her

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sent, confessions or admissions of the accused of acts of sexual intercourse with prosecutrix more than two years after the time of the alleged commission of offense for which he is being tried, and after prosecutrix had attained the age ixteen years, are not competent to be given in evidence against him as tending rove the crime charged in the indictment. State v. Lawrence, 74 O. S. 38.

Where the first count of an indictment charges the defendant with keeping a e where intoxicating liquors are "kept for sale, given away, or furnished for rage purposes," in violation of § 4364-20b, Revised Statutes (G. C. 13232), and second count charges him with keeping a place where intoxicating liquors sold in violation of § 6942, Revised Statutes (G. C. 13195), each count covering same period of time, and the evidence at the trial establishes the fact that ng all such period, the defendant was the keeper of but one place where intoxi- ıg liquors were sold, there is but one offense, and it is error for the court, on rdict of guilty under each count, to inflict the penalties prescribed by each of sections. Weaver v. State, 74 O. S. 53.

An order made by the court of common pleas during the trial of an indictment ı felony, to the effect that in view of the testimony expected to be given by wit- es next to be called the court would continue the trial during the taking of the mony of witnesses likely to give immoral or obscene testimony in the small t room, that the sheriff should admit no one to said room except the jury, ndant's counsel, and members of the bar and newspaper men, and one other on, a witness for defendant, exceeds the power of the court in the premises, its enforcement is a denial to the defendant of his constitutional right to a ic trial. State v. Hensley, 75 O. S. 356.

Where, in a criminal prosecution, the evidence of the state tends to prove the mission by the defendant of the crime charged at a particular time and place, the evidence introduced by the defendant tends to show that at such time he at another place, it is error for the court to refuse an instruction, requested lefendant's counsel, that: "One of the defenses interposed by the defendant in case is what is known in law as an alibi; that is, that the defendant was at her place at the time of the commission of the crime. The court instructs you such a defense is as proper and as legitimate if proved as any other, and all ence bearing on that point should be carefully considered by the jury. And if iew of all the evidence the jury have any reasonable doubt as to whether the ndant was in some other place when the crime was committed, you should give defendant the benefit of the doubt and find him not guilty. The court instructs further that the defendant need not prove such alibi by a preponderance of evidence. Neither does he need to establish it beyond a reasonable doubt, but he evidence as introduced creates in your mind a reasonable doubt of the de- ant's guilt then your verdict should be not guilty, even although you should be able to find that the alibi was fully proved," and to fail to give any instruc- whatever bearing specifically upon the subject. Walters v. The State, 39 O. S. approved and followed. Burns v. State, 75 O. S. 407.

The question as to the weight of the evidence being for the determination he jury and not of the court, it is not error for the court to refuse an instruc- that testimony as to the previous good character of the accused is entitled to

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great weight. The court would, however, be in the line of judicial duty, as favoring a fair trial, if it should give a pertinent instruction embodying the correct rule of law applicable to the evidence. Burns v. State, 75 O. S. 407.

It is not competent for the state, in cross-examination of such witnesses as to the good character of the accused, to prove thereby, that prior to the commission of the alleged crime, they had heard rumors or reports in the community where he resided, that he had committed certain other crimes of various character, and to permit such latitude in cross-examination of such witnesses is error. State v. Dickerson, 77 O. S. 34.

While it is not competent for the state, in making out its case in chief, to introduce evidence of other and prior crimes, for the purpose of supporting the charge made in the indictment, or of reflecting on the character of the accused, yet the commission of a prior crime may be shown for the purpose of furnishing a motive for the commission of the crime charged in the indictment, provided such prior crime is so related to the latter as to have a logical connection therewith, and reasonably to disclose a motive for its commission. State v. Dickerson, 77 O. S. 34.

In order to make competent evidence of the conduct of bloodhounds in trailing or following the tracks of one accused of crime, it is necessary that a preliminary foundation be laid therefor, by showing by some one or more having personal knowledge of the facts, that the particular dog so used had been trained and tested in trailing human beings, and by experience had been found reliable in such cases, and that the dog so trained and tested was, in the instance involved, laid on the trail, whether it was visible or invisible, at a point where the circumstances tended to show that the guilty party had been, or upon a track which the circumstances indicated to have been made by him. State v. Dickerson, 77 O. S. 34.

The allowing of evidence to be introduced out of its order rests in the sound discretion of the court. The remedy for the abuse of such discretion is by motion for a new trial; and if reviewable on error at all, it is only when, taken in connection with all the evidence in the case, it is shown to have prevented the party from having a fair trial. Webb v. State, 29 O. S. 351.

On the trial of an indictment for murder in the first degree, the evidence tending to show no other grade of offense, it is error to charge the jury that, if they find the accused guilty, their duty will be fulfilled by convicting of murder in the first or second degree, or manslaughter. Dresback v. State, 38 O. S. 365.

A judgment will not be reversed merely because the record shows error, to which exception was taken; the error, to be ground of reversal, must be prejudicial to the rights of the party complaining. And this is the rule in criminal as well as civil cases. McHugh v. State, 42 O. S. 154.

New trial will not be granted on account of incompetent evidence which was in, but which court afterwards instructed jury to disregard. Mimms v. State, 16 O. S. 221.

Where, on a trial for murder, the defendant is found guilty of a lower degree of homicide than the highest degree charged in the indictment, and on his motion a new trial is granted, the effect of granting the new trial is to set aside the whole verdict, and leave the case for retrial upon the same issues as on the first trial. State v. Behimer, 20 O. S. 572.

Where an indictment is for but one offense, though charged in several counts in different ways, and the defendant is convicted upon some of the counts and acquitted upon others, the granting of new trial upon his motion opens the case

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etrial upon the counts on which he was acquitted, as well as those on which as convicted. Lesslie v. State, 18 O. S. 390; Jarvis v. State, 19 O. S. 585.

Where the counsel for the accused suggests during the trial that the accused not then sane, and presents the certificate of a "respectable" physician to that t, as required by G. C. § 13608, it is error for the court to refuse a demand a special jury be impaneled to try the question. State v. Roselot, 69 O. S. 91.

It is not error, where the record book has been read to the jury, if the court e to make an order to send it with them to their room of deliberation. Osburn tate, 7 O. (pt. 1) 212.

When incompetent evidence is admitted by the court, over the exception of defendant, and some days thereafter, during the trial, is withdrawn by the t, and the jury instructed to wholly disregard it, and there is no special on why the reception of such evidence should prejudice the defendant, the ment should not be reversed on such ground. McGuire v. State, 3 C. C. 551, C. D. 318.

Where competent evidence is given, and the record (by mistake or otherwise) s that it was ruled out by the court on the application of the other party, in the subsequent cross-examination of the witness by such other party, the evidence is repeated, and goes to the jury without objection, the error of the t in ruling out the evidence first given is cured, and there is no prejudice to party offering such evidence. Thurman v. State, 4 C. C. 141, 2 O. C. D. 466.

Where, on trial of an indictment, the trial court excluded certain evidence ed by the defendant, and which might have been properly admitted, a reviewing t will not disturb the verdict rendered or the sentence pronounced where all evidence given at the trial, together with the charge of the court and all its eedings are before it in the record, and it thereby appears that the jury would been manifestly unjustified in giving any appreciable weight to the rejected ence had it been admitted. Devere v. State, 5 C. C. 510, 3 O. C. D. 24.

It is not reversible error by the court to permit a question to be put, over tion, whether there was or was not a certain communication by the deceased to wife as to who assaulted him, when such a communication would be incomnt if it had taken place. It is very common practice by the courts first to rtain whether there was any conversation at all upon the subject to what the tion related either way, and then to determine its competency, if there is ing disclosed from which the jury could rightfully draw the slightest inference. an v. State, 11 C. C. 464, 5 O. C. D. 234.

It is error on the part of a court to require proof of something not alleged in ndictment or not in issue. Corthell v. State, 11 C. C. 570, 5 O. C. D. 123.

Where the trial judge, in the hearing of the jury, imputes improper motives he defendant's witnesses, and disparages their testimony upon a material mat- it will be presumed, in the absence of any showing to the contrary, that the ndant was thereby prejudiced and deprived of a fair and impartial trial. Rose tate, 13 C. C. 342, 7 O. C. D. 226 (affirmed, 37 W. L. B. 352).

In a case involving the life or liberty of a person, courts should be vigilant in g that he has a fair and impartial trial, and it is better to err in favor of a ndant than against him in this regard. But it is a further duty of courts to that a speedy trial also be had, in so far as may consist with the rights of the ndant, and a large discretion as to this is necessarily conferred upon the trial

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court, and its exercise should be upheld and maintained unless manifestly absurd. Haas v. State, 13 C. C. 418, 7 O. C. D. 509.

Where the court, inadvertently, adjourned to a certain day which happened to be a Sunday or other legal holiday, the court may convene on such day and adjourn to another day, and a special grand jury summoned for such holiday, and on such day being ordered to appear on another day to which the court adjourned, to be impaneled, such proceeding is not irregular. Jones v. State, 14 C. C. 35, 7 O. C. D. 305.

While the order in which testimony shall be introduced must of necessity be largely in the discretion of the trial court, yet this should be a legal and proper discretion, and such course should be pursued as should not prejudice the rights of the parties. Evidence of the acts or declarations of persons alleged to be co-conspirators with the defendant on trial, can not properly be received against him, until the judge is satisfied that, apart from them, there are prima facie grounds for believing in the existence of the conspiracy. Limerick v. State, 14 C. C. 208, 7 O. C. D. 664.

If evidence is admitted under the claim of counsel, that other evidence would be produced which would make it competent, and without which other evidence it would not be admissible, and such other evidence is not produced and the evidence before heard is by the court wholly withdrawn, and the jury clearly and distinctly told to disregard it, the judgment should not for such first admission be interfered with. Martin v. State, 17 C. C. 407, 9 O. C. D. 621.

In charging the jury on the trial of a criminal action, it is proper for the court to direct attention to the admitted or undisputed facts; but where the court recites a material fact as undisputed, which is denied by the accused; or where there is evidence or circumstances tending to disprove such fact, such action of the court is reversible error. Weller v. State, 19 C. C. 166, 10 O. C. D. 381.

It is not error for the court to omit to instruct the jury on a question of law arising in the case, unless instructions are asked by counsel. Mitchell v. State, 21 C. C. 24, 11 O. C. D. 446.

By the law of evidence, testimony competent in chief, by that fact is rendered incompetent in reply. The rule, however, is subject to the discretional authority of a trial court to reopen a case in chief at any time before it is finally closed, and let such evidence in. But this should not be done when, without fault on his part, by reason of the discharge of witnesses, or otherwise, a party would be cut off from an answer to the new testimony, which he might have made if it had been regularly given. Yet, as in this case, if the record fails to show that a party over whose objection evidence in chief has been admitted, out of the usual order, was deprived of the right or cut off from the means of answer to it, such action is not in legal view prejudicial, even if technically irregular. Donald v. State, 21 C. C. 125, 11 O. C. D. 483.

The true objects in charging a jury are (1) to bring into view the issues in a case, and (2) by a pertinent statement of the law, show how the jury should apply the evidence in the various aspects which the trial may develop; and if that be done, in legal view a charge is complete. Hence, when a proposition once has been clearly given, it is the right of the court not to repeat it in varied form of expression, though equally correct; and to avoid possible confusion in the minds of the jury, it generally is wise to refuse to do so. Donald v. State, 21 C. C. 125, 11 O. C. D. 483.

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Where, in the trial of an indictment for murder, the defense being insanity, the rt before the argument to the jury gave several instructions, at defendant's request, n the questions of reasonable doubt of insanity, and a definition in the language he statute defining the crime of murder in the first degree, in the second degree, manslaughter, and again in his general charge defined these crimes, it is not r to refuse a further request of defendant defining manslaughter made after ar- ent, such request being a correct abstract proposition of law, but being inap- able to the defense of insanity or to the facts of the case. Reighard v. State, 22 C. 340, 12 O. C. D. 382.

Irregular conduct of the court will be presumed prejudicial in a criminal case. mmunications by the court to the jury, in the prisoners' enforced absence, which ght influence the verdict as a request to hurry up, will destroy the verdict. Ben- t v. State, 10 C. C. 84, 4 O. C. D. 129.

Where bailiff, during deliberations of jury, went into their room and urged m to hurry up, no prejudice or influence being shown on account thereof, and hing to show that any injustice was done thereby, verdict will not be disturbed. ppel v. Woolner (Cuyahoga Dist. Court), 4 W. L. B. 576.

Where upon a trial for murder in the second degree, after the evidence is all roduced, the trial judge becomes incapacitated to further continue in the case, l the prosecution is adjourned for eighteen days, part of the time from day to by the sheriff, and at other times by another judge of the same subdivision; dur- which adjournment the jury is permitted to separate, going to different parts of county; at the end of the eighteen days another judge of the same district hears arguments, prepares the charge and delivers it to the jury; passes upon the mo- n for a new trial, and sentences the prisoner; and it does not affirmatively appear the record that the new judge read any portion of the evidence, neither that the y had been in any manner tampered with.

Held, that there was irregularity in the proceedings of the court and jury, and t the judgment should be reversed, and a new trial granted. Mason v. State, 5 C. (N.S.) 113, 16 O. C. D. 535.

Where the false pretense proved was a different false pretense frrom the one rged, a judgment of conviction must be reversed, notwithstanding the aggravated ure of the offense committed. Semler v. State, 6 C. C. (N.S.) 393, 17 O. C. D. 581.

Where a defendant enters a plea of not guilty, he puts in issue all the material ts, including the corpus delicti, and a charge to the jury in such a case to the ct that the theft of the goods was not disputed or open to controversy is an inva- n of the province of the jury and constitutes reversible error. Premack v. State, C. C. (N.S.) 364, 20 O. C. D. 828.

Where a person suspected of crime is taken to a private office and questioned two days and nights regarding circumstances surrounding the crime, and is kept der restraint until released by habeas corpus, and is repeatedly told that if he uld tell the truth he would be allowed to go, his interrogators assuming to be the al arbiters of what was the truth, it is evident that his statements were influenced fear of further restraint or the hope of regaining his liberty, and such statements n not be regarded as voluntary.

The claim that the statements made by an accused person under such circum- nces were not confessions, but were admissions, does not make them competent dence against him where they constitute conclusive evidence with reference to the

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crime charged, and to receive such statements as evidence constitutes prejudicial error. Kohn v. State, 12 C. C. (N.S.) 197.

If the trial court erroneously refuses to hear and determine a motion for a new trial upon its merits, the circuit court must reverse the order refusing to hear such motion and remand the case to the trial court to hear and pass upon such motion for a new trial. Armstrong v. State, 15 C. S. (N.S.) 368, 24 O. C. D. 384.

When an accused has been tried for abortion charged in two counts and found guilty upon one and not guilty upon the other, upon his second trial after reversal of the first judgment, it is not error to admit evidenc as to his guilt under the charge as to which he was found not guilty at the first trial. Geer v. State, 16 C. C. (N.S.) 151.

The following charge defines direct and circumstantial evidence in a criminal prosecution for larceny: "The question as to whether the defendant stole the property immediately from the possession of the owner may be shown by direct or circumstantial evidence. Direct evidence is that related by a witness of facts, the existence of which he has actual knowledge while circumstantial evidence is proof of collateral facts and circumstances having relation to and connection with the main fact involved in the transaction. For example, in the crime of larceny, the act of stealing property from the owner is the main fact, constituting the criminal act, while the fact of having possession of the property recently stolen may be collateral to such act of theft, and connected therewith, provided such possession appears to have been obtained and maintained under such circumstances and in such way and manner as to indicate or show, that the one having possession did not obtain it honestly and innocently. If it should be made to appear by competent evidence that such possession was not obtained honestly and innocently, that the defendant gave a false account of his possession, then the jury may deduce or infer from such conduct, acts or declarations of the defendant, the fact that the accused himself stole the property from the owner, even though there may be no evidence which shows the actual act of removing the property from the possession of the owner. The jury must therefore consider all the evidence of the loss of the property by the owner in the light of the evidence touching the possession of the same by the defendant, the nature of the property, and the disposition made of it by the defendant." State v. Radcliffe, 26 O. D. 147.

The following charge states the effect of evidence tending to show possession of property recently stolen in a criminal prosecution for larceny: "Where property shown to have been recently stolen comes into the possession of one who is charged with its theft, the jury will consider all the facts and circumstances connected with such possession, the length of time of such possession in relation to the time of the loss of the property by its owner, the acts and declarations of the one accused of the theft, the defendant, its disposition by him and his explanation of how he came into possession or concerning the disposition of the property by him. If the jury should believe and find from the evidence that the defendant has made a reasonable and satisfactory explanation of how he came into possession; that he has made a reasonable and satisfactory explanation in connection with such possession and the disposition of the same by him; if the jury believes that such explanation by the defendant is consistent with his innocence of the theft of the property, then you should acquit him of the crime of larceny provided such possession and his explanations raise a reasonable doubt in the minds of the jury concerning his guilt. But if on the other hand, the jury finds and have an abiding conviction from all the evidence that

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defendant has failed to give a reasonable and satisfactory account and explana- of how he came into possession, as well as of the disposition made of the prop- by him, or, if the jury find that the defendant gave a false account and explana- of either how he came into possession or concerning the disposition made of the erty by him, which is inconsistent with his innocence, but consistent with his t, in such event the jury would be warranted in presuming and inferring, as a ter of fact, that he is guilty of the larceny of the property. If such be the ion and finding of the jury; if the jury have an abiding conviction of the guilt he defendant, based upon such possession, his explanations, declarations, and ad- sions made by him in reference to the possession and disposition of the property, from the circumstances and surrounding conditions appearing in the evidence, the jury would be warranted in finding him guilty of the crime charged against and you should in such event find him guilty." State v. Radcliffe, 26 O. D. 147.

Misconduct of jurors.—Where, on the hearing of the defendant's motion for w trial, charging misconduct of jurors, the evidence before the trial court was y conflicting, and the trial court overrules the motion, its action thereon will be disturbed by this court. Devere v. State, 5 C. C. 511, 3 O. C. D. 24.

A verdict of guilty in a criminal case will not be reversed for misconduct in a r, while the jury were viewing the premises, in asking a question of a woman in rd to the premises, it not appearing that any answer was made, or that any- g was done or said upon the view that could prejudice defendant. Reighard v. e, 22 C. C. 341, 12 O. C. D. 382.

Where the court in a criminal case instructed the sheriff to furnish food to jury upon their retirement, it is not misconduct of the sheriff, just before the retired for sleep, to ask them if they wished for anything to eat, or for the to tell the sheriff what they wanted, nothing being furnished but coffee and ghnuts. Reighard v. State, 22 C. C. 341, 12 O. C. D. 382.

Where, in a capital case, a person not summoned as a juror personates one who returned on the venire, sits at the trial and joins in a verdict of guilty, the ver- will be set aside and a new trial granted, it appearing that neither the accused his counsel was guilty of laches. McGill v. State, 34 O. S. 228.

The holding of conversations by the jury, while in their room, with persons on street, in regard to any subject of their deliberations, before their verdict is lered, is, in general, good cause for setting aside their verdict.

When a jury, of their own motion, and by their own means, without the knowl- of the court, and without the presence, knowledge or consent of the prisoner, in a part of a newspaper, purporting to contain a part of the charge of the court he case they are considering, and use said information to guide their delibera- ns, although the charge thus published may happen to be accurate, the verdict t to be set aside. Farrer v. State, 2 O. S. 54.

Statements by a juror, in the jury room, of facts within his own knowledge ling to contradict material evidence offered at the trial, affords substantive nd for granting a new trial to the party whose witnesses are thus contradicted; it must be proved aliunde, and not by affidavits of jurors alone. Kent v. State, O. S. 426.

Where misconduct of the jury, in the manner of balloting, is shown only upon affidavits of two of the jurors, such evidence is not competent. Goins v. State, O. S. 457.

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Misconduct on the part of a jury can not be based upon the unsupported affidavit of one who obtained his information from a member of the jury.

When a jury, after having retired to consider their verdict, is taken by the sheriff to a restaurant for supper, without order of court or knowledge of parties, is no misconduct of jury. Johnson v. State, Supreme Court, without report, 38 W. L. B. 235.

The separation of the jury after they have agreed upon a verdict is left to the discretion of the court, and where, on such separation, by direction of the court, nothing is done to the prejudice of the defendant, it is not such misconduct of the jury as necessarily to require the granting of a new trial. Bainbridge v. State, 30 O. S. 264.

The fact that one juror, after the jury had retired, separated from the rest and went to a coffee house to procure some intoxicating liquor, though improper, is not of itself sufficient ground for setting aside the verdict. State v. Dougherty, 1 Dec. Rep. 37, 1 W. L. J. 271.

The separation of a juror from his fellows before they have agreed upon a verdict, for the purpose of obtaining liquor, when not explained or shown to be excusable, will entitle the prisoner to a new trial. Weis v. State, 22 O. S. 486.

The jury in a capital case may in court be advised upon matters of law; ask a question of a witness before examined; may have refreshment by leave of the court, and a sick one may be examined by a physician. State v. Town, W. 75.

Where a juror on his voir dire says that he has expressed no opinion, and after it develops that before the trial he said, "If he [the prisoner] is not hung, there is no use of laws," a new trial should be granted. Busick v. State, 19 O. 198.

Where a juror states when being examined that he has formed no opinion, when, in fact, he has previously expressed an opinion, a motion for a new trial should be supported by an affidavit showing that such fact was unknown to the accused or his counsel. Parks v. State, 4 O. S. 234.

When a juror is challenged on the ground of his incompetency, or a motion for a new trial is made on like ground, the opinion of the court overruling the challenge, or the motion, can not be reviewed by this court, unless the record shows, affirmatively, that it contains all the evidence submitted to the court below on the question. Cooper v. State, 16 O. S. 328.

A motion for a new trial on the ground that one of the jurors has previously expressed an opinion is properly overruled if the evidence is conflicting. Blackburn v. State, 23 O. S. 146.

Where a juror, during the trial, expresses opinions outside of the court showing a strong prejudice against the prisoner and a desire to convict regardless of the evidence, it is ground for a new trial. State v. Carter, 11 Dec. Rep. 123, 25 Bull. 17.

The expression of a juror, before the trial, of a hypothetical opinion, as to the guilt or innocence of the accused, dependent upon a particular state of facts, as to the existence of which no opinion was given, does not constitute a sufficient ground for a new trial. Loeffner v. State, 10 O. S. 598.

If it were established by competent evidence that the jury experimented with and talked through a dictagraph, which had been made an exhibit in the case and was properly in their possession, misconduct on the part of the jury would not be shown. Andrews v. State, 15 C. C. (N.S.) 241, 23 O. C. D. 564 (leave refused, 57 W. L. B. 520).

Misconduct of the prosecuting attorney.—On the trial of one charged with murder in the perpetration of a robbery, the state called a witness who gave

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terial testimony tending to convict the accused, and the prosecuting attorney con-
led from the witness, until after the trial, the fact that he was under indict-
nt in the same court for harboring the accused, knowing that he had committed
crime. Held, that this was not misconduct, for which a new arial should be
nted. Jackson v. State, 39 O. S. 37.

Where, in a motion by the defendant for a new trial, it was alleged that there
s misconduct on the part of the prosecuting attorney in his argument to the jury,
l that the trial judge, on the application of the defendant that he would do so,
used to interfere or prevent such misconduct, to which failure or refusal the
endant excepted, but the bill of exceptions contained no statement as to what
urred at the time, or no exception to the action of the court thereon, otherwise
n in the affidavits filed by the defendant in support of his motion, which state-
nts were controverted by affidavits on the part of the state; and the trial
rt having made no finding as to what took place, or whether any action by the
rt was had or excepted to, a reviewing court can not say that there was any such
conduct, or any error on the part of the court, or that there was any exception
reto, or that for this a new trial should be granted. Turner v. State, 5 C. C. 537,
). C. D. 263.

Where the defendant in a criminal case is asked on cross-examination by the
te's attorney concerning alleged admissions by him made to another person whose
timony regarding them had been offered by the state and rejected by the court as
properly obtained, an objection to such cross-examining question is made and
tained, it is improper for the attorney for the state, in his argument to the jury,
call attention to said ruling and to state to the jury that said evidence of such
nissions was excluded by the court "upon a long-settled and well-understood
nciple of law that a confession, in order to be admissible, must be voluntary."
rles v. State, 6 C. C. 331, 3 O. C. D. 478.

The counsel for the defendant, upon the trial of this case, sharply attacked the
tives of the prosecutor, in carrying on the suit. The prosecutor in arguing to
jury, said the indictment had been returned by as good a grand jury as ever
in the county, and pointing to the name of the foreman, on the back of the
ictment, said he was a good citizen, etc. Held, that this was no ground for re-
sing the judgment in the case. Champion v. State, 9 C. C. 627, 6 O. C. D. 82.

When the natural and probable effect of an improper address to the jury by the
secuting attorney is to create an unjust prejudice against the defendant and
ure a decision influenced by the prejudice so created, a new trial should be
nted.

The neglect of counsel for defendant to make objection to such misconduct at
time will not preclude its consideration upon a motion for a new trial, where its
judicial effect could not have been prevented thereby. Gawn v. State, 13 C. C. 116,
). C. D. 19.

Where misconduct of the prosecuting attorney in his argument to the jury is
igned as ground for setting aside the verdict and for a new trial, the general
e is that to lay the foundation for a review by an appellate court, the attention
the trial court should have been challenged by an objection and exception taken
the time. Cases, however, may arise in which comments of the prosecuting
orney are so flagrantly unjust and improper as to require a verdict obtained by
h statements, to be set aside on a motion for a new trial, for the reason that
accused has been deprived of a fair trial, even if no objection was made at the

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time. If for any reason the accused has not been awarded a fair and impartial trial, a verdict of guilty should be set aside and a new trial ordered, and failure of the trial court in this regard is subject to review. Davis v. State, 20 C. C. 431, 10 O. C. D. 738.

On the trial of a criminal case, it is not the absolute right of counsel to read to the jury, as a part of his argument, extracts from law books, which he claims state the law governing the case. The jury is bound to receive and be governed by the law as declared by the court, which has a discretion to allow or refuse such a mode of argument to the jury. McGuire v. State, 3 C. C. 551, 2 O. C. D. 318.

Where defendant denied statement of facts, and prosecuting attorney said "You have had a chance to testify in this case and have not done so," there is not sufficient ground to set aside verdict. Calkins v. State, 18 O. S. 366.

Statements by the prosecuting attorney in his closing argument to the jury conveying the impression that a certain record which had not been introduced in evidence would show, had the state been permitted to introduce it, that the defendant had been an inmate of the penitentiary, are improper, and should be disapproved by the court at the time. To overrule an objection to such statements, thus giving the court's approval of them, is error. Burns v. State, 75 O. S. 407.

Where the prosecuting attorney comments upon matters not in evidence and extraneous to the case and accuses the defendant's counsel of conduct apart from the proceedings of the trial of a highly unprofessional or criminal character, such prejudice will be presumed as to require a reversal of the judgment. Miller v. State, 73 O. S. 195.

Where a prosecuting attorney in his argument to the jury in commenting on confessions claimed to have been made by the defendant, who was not examined as a witness in the case, made use of this language: "He admits that he was present when she was killed; of course he does not say he killed his mother; he says that the two robbers killed her, and that he stood by and saw them do it. Is this a reasonable story?" This is not such misconduct of the prosecuting attorney as would require the trial court to set aside the verdict and grant a new trial. No statement having been made to the jury as to the right of the defendant to testify, or any comment made on his refusal to do so, and it not appearing that the defendant was in any way prejudiced thereby, it rests in the sound and legal discretion of the trial court. Schneider v. State, 2 C. C. 420, 1 O. C. D. 565.

Where a person is present in court, competent to testify, and it appears that if the claim of the party omitting to call such person as a witness was correct, it could be established by such person, the failure to call him, if not adversely interested or biased, may properly be commented upon by the opposing counsel in his argument to the jury. And arguments so made to the jury on the evidence of the counsel for the state, that defendant at the time of her arrest and up to the trial, at no time had denied her guilt when accused, or attempted to explain any circumstances or suspicion against her, if such argument does not fairly refer to the fact that she had a right to testify in the case, and that her failure to do so raised a presumption that she was guilty, is not such misconduct of the prosecuting attorney as to require that a new trial be awarded. McGuire v. State, 3 C. C. 551, 2 O. C. D. 318.

Where the prosecutor makes a statement of facts outside of the evidence, and he is at once reprimanded by the court and the jury is instructed to disregard such statement, and the fact stated is immaterial to the issue, a conviction will not be reversed. Thurman v. State, 4 C. C. 141, 2 O. C. D. 466.

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Where the prosecuting attorney was challenged by counsel for the defendant state to the jury why he had not tried the case long before, and in his reply prosecutor declared the reason was the defendant absconded and could not be nd by the police, the declaration does not, if true, amount to misconduct. Ryan State, 10 C. C. (N.S.) 497, 20 O. C. D. 306.

Where the motives of the prosecuting attorney are attacked, and he, in his gument to the jury, said the indictment had been returned by as good a grand y as ever sat in the county, and pointing to the name of the foreman on the back the indictment, said he was a good citizen, there is no ground for reversal. ampion v. State, 9 C. C. 627, 6 O. C. D. 82.

A declaration by the prosecutor that a certain matter, if true, might easily ve been proved by calling the defendant as a witness, is ground for a new trial ere the jury is not cautioned to disregard it. State v. Hudson, 7 O. L. R. 502.

A certificate to a bill of exceptions that all the evidence introduced or offered trial is contained therein, does not show that all the evidence offered or introced at a motion for new trial is contained therein. Accordingly, it will not be sumed that an affidavit filed by the defeated party setting forth improper conct on the part of the attorney for the prevailing party was uncontradicted if court has refused to grant a new trial on the ground of such misconduct; but reviewing court will assume that it may have been shown by affidavit or otherse that the language which was complained of was not in fact used. Berman v. ate, 16 C. C. (N.S.) 106, 25 O. C. D. 386 (affirmed, 81 O. S. 508).

In a criminal case, where it is plain from the evidence that the jury could not ve reached any conclusion other than that which was reached, a verdict will not set aside for reprehensible misconduct of the prosecuting attorney. Sisson v. ate, 19 C. C. (N.S.) 99.

As amended September 3, 1912, section 10 of article I of the constitution proles in part that "no person shall be compelled, in any criminal case, to be a tness against himself but his failure to testify may be considered by the court d jury and may be made the subject of comment by counsel.

Verdict not sustained by sufficient evidence.—A judgment will not be ersed because the verdict is contrary to the evidence, unless it is manifestly so, d the reviewing court will always hesitate to do so where the doubts of its proiety arise out of a conflict in oral testimony. Breese v. State, 12 O. S. 146.

In a criminal case, where there is a failure of proof establishing the guilt of accused, and the verdict is adverse to him, the court, on his motion made for t purpose, should award him a new trial. Crandall v. State, 28 O. S. 479.

A judgment will not be reversed because the verdict is contrary to the evidence, less it is manifestly so, but there is a marked difference between the practicable plication of this rule in civil and criminal cases. In a civil case a verdict is thorized if supported by a bare preponderance of the testimony, but in a criminal e a verdict of guilty is only authorized when the evidence produced establishes guilt of the accused beyond a reasonable doubt; and the verdict may be manitly against the evidence, although supported by a preponderance of the testimony, the reason that more than a preponderance of the testimony is required to rrant a verdict of guilty. Moran v. State, 11 C. C. 465, 5 O. C. D. 234.

On a motion for a new trial on the ground that since the witnesses are not ditable the verdict is contrary to the evidence, the opinion of the common pleas, in using such motion, can not be reversed on error. Whitcomb v. State, 14 O. 282.

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Whether the proof shows that the accused is guilty as a principal in the larceny, or simply of receiving the goods knowing them to have been stolen, is a question of fact, and where there is room for doubt, the finding of the jury should be accepted as conclusive. Whiting v. State, 48 O. S. 220.

Where the evidence is conflicting and the court overrules a motion for a new trial, its action will not be disturbed. Devere v. State, 5 C. C. 509, 3 O. C. D. 249.

Where several counts charge the same offense in as many different ways, and the defendant is convicted upon some of the counts and acquitted upon others, the granting of a new trial upon his motion opens the case for retrial upon all the counts of the indictment. Leslie v. State, 18 O. S. 300; Jarvis v. State, 19 O. S. 585.

Where, on a trial for murder, the defendant is found guilty of a lower degree of homicide than the highest degree charged in the indictment, and on his motion, a new trial is granted, the effect of granting the new trial is to set aside the whole verdict and leave the case for retrial upon the same issues as to the first trial. State v. Behimer, 20 O. S. 572.

If exceptions be taken to the decision of the court overruling a motion for a new trial, because the verdict is not sustained by sufficient evidence or is contrary to law, the bill of exceptions must contain all the evidence. See G. C. § 13680, and cases thereunder.

For power of courts to review on weight of evidence, see G. C. § 13751.

Weight of evidence.—Whether the proof shows that the accused is guilty as a principal in the larceny, or simply of receiving the goods, knowing them to have been stolen, is a question of fact, and where there is room for doubt, the finding of the jury should be accepted as conclusive. Whiting v. State, 48 O. S. 221.

The authority of this court to supervise the judgment of an inferior court, because of any supposed error in overruling a motion for a new trial, on the ground that the verdict was against the weight of the evidence, can only be derived from statute, and was therefore taken away by the repeal of the statute of 1845 relating thereto. Loeffner v. State, 10 O. S. 598, see also Whitcomb v. State, 14 O. 282.

Formerly in a criminal case, as well as in a civil action, it could be assigned for error that the court overruled a motion for a new trial predicated upon the ground that the verdict was against the weight of evidence. O'Meara v. State, 17 O. S. 516; Crandall v. State, 28 O. S. 479.

A reviewing court should not set aside the verdict of a jury in a criminal case unless it is manifestly against the weight of the evidence. Andy v. State, 2 O. A .R. 103, 19 C. C. (N.S.) 93, 26 O. C. D. 146.

For jurisdiction of court to review on weight of evidence, see G. C. § 13751 and notes.

Newly discovered evidence.—A refusal to grant a new trial on the ground of newly discovered evidence which was merely cumulative, is not ground for a reversal of the judgment on error. Loeffner v. State, 10 O. S. 598.

The granting of a motion for a new trial upon the ground of newly discovered evidence is necessarily committed to the wise discretion of the court, and a court of error can not reverse unless there has been a gross abuse of that discretion. And whether that discretion has been abused must be disclosed from the entire record. The new testimony proffered must neither be impeaching nor cumulative in character. Unless the trial court or court of error, in view of the testimony presented to the court, and jury, finds that there is a strong probability that the newly discovered evidence will result in a different verdict, a new trial should be refused. State v. Lopa, 96 O. S. 410.

Newly discovered evidence, in the meaning of this section, is such evidence as would be presented to the jury on the trial of the issue as to the guilt of the defendant. Evidence as to the misconduct of a juror is not "newly discovered evidence." Schneider v. State, 2 C. C. 420, 1 O. C. D. 565.

To found the right of a new trial on the ground of newly discovered evidence, the party against whom a verdict has been rendered must make it appear by suitable proof that he exercised due diligence in attempting to procure such proof for use at the trial, and his mere statement in his own affidavit that "at, before and during

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id trial he did not know of the existence, and could not by the exercise of reason-
ble diligence have ascertained the same," is not necessarily conclusive upon the ques-
on of diligence, even though not contradicted by affidavit or other direct proof.
arles v. State, 6 C. C. 332, 3 O. C. D. 478.

A verdict in a homicide case will not be set aside and a new trial granted on the
ound that newly discovered evidence shows that a person who had been in the pen-
entiary was seen in the neighborhood at about the time the crime was committed,
here there is no evidence that such person was implicated in or connected with the
ime or had any knowledge of it. Wade v. State, 2 C. C. (N.S.) 189, 15 O. C. D. 279-
ffirmed, 70 O. S. 463).

Where a man and woman are tried together for arson, and the woman tries to
ail herself of the presumption of coercion arising from coverture but the jury find
ainst her and she then files affidavits in support of a motion for a new trial alleging
at she could prove the coverture if given an opportunitiy upon a new trial, and the
ial judge having considered her motion overrules it, there is no reversible error.
avis v. State, 15 O. 72.

After a conviction for robbery, a motion for a new trial based on the fifth clause
§ 7350, Revised Statutes (G. C. § 13745), for "newly discovered evidence material
r the defendant which he could not with reasonable diligence have discovered and
oduced at the trial," will not be granted, where such evidence consists of affidavits
tting forth the accused's excessive use of intoxicants and drugs, particularly ab-
nthe and morphine, before and at the time of his arrest; that the particular char-
teristic of the use of such liquor and drug is to make their user and habitue
cretive as to their use, deceitful, careless of results, forgetful and irresponsible,
d that counsel for the accused had no knowledge of said habits of the accused until
ter the trial; it appearing that the accused was in jail, denied the use of such drugs,
d at the latter date was apparently in possession of all his faculties. State, 5 C. C. (N.S.) 200, 16 O. C. D. 723.

The fact that the accused is addicted to the use of absinthe and morphine, the
fect of which was to make him deceitful, careless of results, forgetful and irres-
onsible, and the fact that he did not communicate these facts or his original station
life to his attorney, does not amount to newly discovered evidence for which a
w trial may be given. McLaughlin v. State, 20 C. C. (N.S.) 492.

A new trial will not be granted on the ground of newly discovered evidence, sim-
y because the counsel for the accused did not know of the existence of the evidence,
hen it was possible for the defendant to communicate it to him at any time previ-
s to the trial, and he failed to do so. McLaughlin v. State, 20 C. C. (N.S.) 492.

ec. 13746. When application to be made.

The application for a new trial shall be by motion, upon written
rounds, filed at the term the verdict is rendered, and except for the
ause of newly discovered evidence material for the person applying,
hich he could not, with reasonable diligence, have discovered and
roduced at the trial, shall be filed within three days after the verdict
as rendered, unless unavoidably prevented. (R. S. § 7351; 66 v. 316,
193.)

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Written grounds.—A statement in a motion for a new trial in a criminal case that "the court erred in refusing to admit testimony to go to the jury which was offered by the defendant," is a sufficient statement to bring to the notice of a reviewing court the question whether or not error intervened in refusing to permit the defendant to cross-examine the state's witnesses. Morgan v. State, 48 O. S. 371.

That the judgment was rendered near the close of the term does not give to the losing party the right to file a motion for a new trial after the term has ended, although it was filed within three days after the rendition of the judgment, and before it was actually entered upon the journal. The motion must be filed not only within the three days, but also before the term has ended. State v. Eager, 3 C. C. 581, 2 O. C. D. 335.

It is no ground for the reversal of a judgment, that a motion for a new trial was made, argued and overruled in the absence of the prisoner, where no objection was made till after sentence. Griffin v. State, 34 O. S. 299.

The hearing of a motion for a new trial is not a part of the trial. The presence at the hearing of such motion of one convicted of a crime is not necessary and it is error for the trial judge to refuse to hear and determine same on account of the convict's absence. Armstrong v. State, 15 C. C. (N.S.) 368, 24 O. C. D. 384.

A trial court is without jurisdiction to hear a motion for a new trial in a criminal prosecution at a term of court subsequent to that at which the verdict was returned. Lisberger v. State, 10 C. C. (N.S.) 66, 19 O. C. D. 394.

A holiday counts as one of the three days allowed for filing a motion for a new trial, unless the holiday is the last of the three days. Oberer v. State, 8 C. C. (N.S.) 93, 18 O. C. D. 620.

Evidence as to the misconduct of a juror is not newly discovered evidence within the meaning of the exception in this section, and a motion for a new trial based thereon should be filed within three days after the verdict was rendered. Schneider v. State, 2 C. C. 420, 1 O. C. D. 565.

Granting motion.—Where the indictment is but for one offense, though charged in several counts in different ways, and the defendant is convicted upon some of the counts and acquitted upon others, the granting of a new trial upon his motion opens the case for retrial upon the counts on which he was acquitted as well as those on which he was convicted. Lesslie v. State, 18 O. S. 390; Jarvis v. State, 19 O. S. 585.

Where, on a trial for murder, the defendant is found guilty of a lower degree of homicide than the highest degree charged in the indictment, and, on his motion, a new trial is granted, the effect of granting the new trial is to set aside the whole verdict, and leave the case for retrial upon the same issues as on the first trial. State v. Behimer, 20 O. S. 572.

A verdict of not guilty of rape, but guilty of an attempt to commit, having been set aside, a new trial on the whole indictment will be ordered. Fox v. State, 34 O. S. 377, 380.

Abandonment of motion.—Where it appears from the record in the case that after the verdict of guilty was returned, the defendant filed his motion in writing for a new trial, but it does not appear what disposition, if any, was made of the motion; that afterward, upon inquiry, the defendant stated to the court that he had nothing further to say why sentence should not be pronounced, and thereupon the court, without objection from the defendant, proceeded to judgment, and sentenced the defendant to imprisonment in the penitentiary for a term of years, the judgment can not be reversed on the ground that the sentence was passed pending the motion for a new trial. Upon such a record it must be presumed that the motion for a new trial was abandoned before judgment. Blackburn v. State, 25 O. S. 554.

Sec. 13747. What causes for new trial must be sustained by affidavits.

The causes enumerated in subdivisions two, three and five of section thirteen thousand seven hundred and forty-five, must be sus-

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ined by affidavits, showing their truth, and may be controverted affidavits. (R. S. § 7352; 66 v. 316, § 194.)

The general rule undoubtedly is that affidavits of jurors are not admissible to peach their verdict. But where, on a motion for a new trial, other testimony given to the court tending to show that the jurors, in their retirement, had in ir possession a newspaper, or part of a newspaper, containing a part of the charge the court, affidavits of jurors may be received to show what the paper was, if ir possession and use of it does not involve a charge of improper motive on the t of the jurors. Farrer v. State, 2 O. S. 54.

The granting of a motion for a new trial upon the ground of newly dis-ered evidence is necessarily committed to the wise discretion of the court, l a court of error can not reverse unless there has been a gross abuse of that cretion. And whether that discretion has been abused must be disclosed from entire record. The new testimony proffered must neither be impeaching nor nulative in character. Unless the trial court or court of error, in view of the timony presented to the court, and jury, finds that there is a strong probability t the newly discovered evidence will result in a different verdict, a new trial uld be refused. State v. Lopa, 96 O. S. 410.

Misconduct on the part of a jury can not be based upon the unsupported affi-it of one who obtained his information from a member of the jury. Andrews State, 15 C. C. (N.S.) 241, 23 O. C. D. 564 (leave refused, 57 W. L. B. 520).

Evidence of what a juror said after the rendition of a verdict as to improper urrences in the jury room will not be received to invalidate the verdict. Devere State, 5 C. C. 511, 3 O. C. D. 24.

A motion for a new trial, based on the ground that a juror has falsely an-ered that he had neither formed nor expressed an opinion on the guilt of accused, uld be submitted by an affidavit, showing that the fact of such objection was known either to the accused or his counsel at the time the jury was impaneled. rks v. State, 4 O. S. 234.

In order that affidavits used on a motion for a new trial may be considered a reviewing court, there must be a certificate of the trial judge that the affida-s in question were all the evidence introduced on the hearing of the motion. rman v. State, 16 C. C. (N.S.) 106 (affirmed, 81 O. S. 508).

Affidavits are not exclusive of all other modes of proof. Where misconduct the court and prosecuting attorney appear in the stenographer's transcript of proceeding at the trial attached to and made part of the bill of exceptions, it evidence of as high a character as would be the affidavits of witnesses. Miller State, 73 O. S. 195.

An affidavit alleging newly discovered evidence is not conclusive of the right have a new trial, even though it is not contradicted. Searles v. State, 6 C. C. , 3 O. C. D. 478.

The affidavits filed in support of a motion for a new trial can only be brought ore a reviewing court by being made a part of the bill of exceptions. Mont-nery v. State, 12 C. C. 679, 4 O. C. D. 199.

A reviewing court will not reverse a trial court in overruling a motion for new trial where one affidavit supports and one denies the facts upon which the tion is based. Montgomery v. State, 12 C. C. 679, 4 O. C. D. 199.

Errors of law occurring in the admission and rejection of evidence, and in the rge of the court, need not be alleged in a motion for a new trial. Error may be secuted on the exceptions noted at the trial. Searles v. State, 6 C. C. 331, 3 O. C. 478.

Motion for a new trial.

(Title.) Indictment for ———.

And now comes the said A B and moves the court for a new trial in this cause the following reasons, to-wit:

1. Irregularity in the proceedings of the court (or, jury, or, prosecuting attor-y) in this, to-wit: (state the irregularity).

2. Error of law occurring at the trial, in this, to-wit:

(Give in the same manner, according to the facts, any reasons mentioned in e statute.)

J S, Attorney for the Defendant.

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Order granting new trial.

(Title.) Indictment for ———.

This cause being heard on the motion for a new trial, the court, on consideration and for good cause shown, do grant the same. The said verdict is accordingly vacated, and a new trial granted.

MOTIONS IN ARREST.

Sec. 13748. When a motion in arrest of judgment may be granted.

A motion in arrest of judgment may be granted by the court for either of the following causes:

1. That the grand jury, which found the indictment, had no legal authority to inquire into the offense charged, by reason of such offense not being within the jurisdiction of the court;

2. That the facts stated in the indictment do not constitute an offense. (R. S. § 7353; 66 v. 316, § 195.)

If an indictment is insufficient, the defect is not one of form, but of substance; hence, the objection is fatal, though not made until the verdict has been rendered. Hagar v. State, 35 O. S. 268.

Notwithstanding the plea of guilty, the sentence must be reversed if the indictment be defective. Davis v. State, 19 O. S. 270.

A motion to arrest the judgment in the case, which motion did not allege either of the grounds set out in § 7353, for which a motion to arrest the judgment in a criminal case may be granted, was properly overruled. Myers v. State, 4 C. C. 570; 2 O. C. D. 712.

A plea of guilty to an indictment which does not contain facts sufficient to constitute a crime, and the payment of the fine and costs adjudged by the court upon such plea, will not prevent a prosecution in error by the accused to have such judgment reversed. Hogue v. State, 13-23 O. C. C. 567.

Objection to an indictment containing two counts, on the ground that each count charges an offense different and distinct from that charged in the other, is not available for a defendant when made for the first time by a motion in arrest of judgment. Devere v. State, 5 C. C. 509; 3 O. C. D. 24.

Where the court proceeded to sentence a party without disposing of a motion in arrest of judgment, it was held that this irregularity afforded no ground for reversing the judgment, unless the points made in the motion were such as to require the arrest. Young v. State, 6 O. 435.

In a criminal case, where the defendant, convicted of a felony, has duly filed a motion in arrest of judgment, which the record shows was sustained by the court, it is not competent for the court, on motion of the state at the next term, to order the record of the previous term amended and made to show that the motion in arrest was not sustained, but was overruled by the court. And the making of such order is error. Bates v. State, 63 O. S. 11.

Omission of a necessary negative averment in the indictment is ground for the motion. Geiger v. State, 5 C. C. 283, 285; 3 O. C. D. 141.

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Where it appears from the caption of an indictment, and other parts of the rd, that a prosecution has been "carried on in the name and by the authority he state of Ohio," in a specified county of the state, and the offense is charged ave been committed in the county, the failure to allege that the county is in state of Ohio is no ground for the arrest of judgment. Foster v. State, 19 S. 415.

After a plea of guilty, such matters only as may be taken advantage of by ion in arrest of judgment, can be interposed to prevent sentence. Carper v. te, 27 O. S. 572.

A motion in arrest of judgment must be sustained where entered under a plea guilty to an insufficient indictment, and this is true, notwithstanding the fine costs imposed have been paid. Hogue v. State, 3 C. C. (N.S.) 315, 13 O. C. D. 567.

A defendant can not withdraw a plea of not guilty for the purpose of making otion to quash the indictment; such irregularity must be taken advantage of motion in arrest of judgment. State v. Decker, 1 Dec. Rep. 527, 10 W. L. J. 328.

Where, under a former act for the prevention of gaming it provided for the unity of those testifying for the state concerning the offense, the defendant so ified, the judgment should be arrested and the defendant discharged. Evans v. te, 1 Dec. Rep. 436, 10 W. L. J. 49.

On an indictment containing two counts substantially alike, a verdict of actal upon one and of guilty upon the other, does not necessarily present such se of repugnancy as to require an arrest of judgment. Sasser v. State, 13 O. ; see also, Griffin v. State, 18 O. S. 438.

The misspelling of the name of the defendant in the indictment under which vas tried does not present a question which can be raised on a motion for arrest udgment. Smile v. State, 17 C. C. (N.S.) 500, 1 O. A. R. 402 (leave to file red, 11 O. L. R. 263).

Motion in arrest of judgment.

(Title.) Indictment for ———.

And now comes the said A B and moves the court to arrest judgment in this for the following cause (or, causes) to-wit:

That the grand jury which found the indictment had no legal authority to ire into the offense charged, by reason of it not being within the jurisdiction he court, because (etc., state why not in the jurisdiction).

(Or say:)

That the facts stated in the indictment do not constitute an offense, because ., state the defect in the indictment).

J S, Attorney for Defendant.

Entry—Motion in arrest granted—Order for recognizance.

(Title.) Indictment for ———.

This cause being heard on the motion in arrest of judgment, the court, upon d cause shown, allows the same.*

And it appearing from the evidence that there is sufficient reason to believe said endant guilty of an offense, it is ordered that he enter into a recognizance, with icient surety, conditioned for his appearance at the first day of the ——— n of this court; or in default thereof that he be committed to the jail of the nty.

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Entry—Motion granted—Defendant discharged.

(Title.) Indictment for ———.

(As in last to *, and conclude:)

It is thereupon further ordered that said defendant be discharged.

Sec. 13749. When it may not be made.

A judgment shall not be arrested for a defect in form, and a motion in arrest of judgment must be made within three days after the verdict is rendered. (R. S. § 7354; 66 v. 316, 317, §§ 196, 198.)

An indictment designating the accused by initial letters of his baptismal name is not ground for arrest of judgment. Smith v. State, 8 O. 295.

That the accused went to trial without a copy of the indictment is not a ground for arrest of judgment. Smith v. State, 8 O. 295.

Where it appears from the caption of an indictment and other parts of the record, that a prosecution has been "carried on in the name and by the authority, of the state of Ohio," in a specified county of the state, and the offense is charged to have been committed in the county, the failure to allege that the county is in the state of Ohio is not a sufficient ground for the arrest of judgment. Foster v. State, 19 O. S. 415.

Misjoinder of counts in an indictment can not be made for the first time by a motion in arrest of judgment. Devere v. State, 5 C. C. 509, 3 O. C. D. 249.

On an indictment containing two counts substantially alike, a verdict of acquittal upon one and of guilty upon the other, does not present such a case of repugnancy as to require an arrest of judgment. Sasser v. State, 13 O. 453; see also, Griffin v. State, 18 O. S. 438.

A motion in arrest of judgment must be made before judgment is rendered. Harlow v. State, 1 N. P. (N.S.) 323.

Sec. 13750. Effect of allowing motion in arrest of judgment.

A motion in arrest of judgment shall place the defendant in a like position with respect to the prosecution as before the indictment was found. If there is reason to believe, from the evidence in the trial that the defendant is guilty of an offense, the court shall order him to enter into a recognizance, with sufficient surety, for his appearance at the first day of the next term of such court; otherwise the defendant shall be discharged. (R. S. § 7355; 66 v. 317, § 197.)

Where the record shows that a motion in arrest was sustained by the court the court, on motion of the state at the next term, can not order the record of the previous term amended to show that the motion in arrest was overruled, since such order deprives the defendant of a substantial right under this section, viz., to be placed in the same position he was in before the indictment was found. Bates v. State, 63 O. S. 11.

The record must show affirmatively that excluded evidence should have been admitted before a reversal can be had. Hamilton v. State, 34 O. S. 82.

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ERROR.

Sec. 13751. Judgment and final orders in criminal cases reviewed; supreme court not to determine weight of evidence; exception.

In a criminal case, including a conviction for a violation of an ordinance of a municipal corporation, the judgment or final order of a court or officer inferior to the common pleas court may be reviewed in the common pleas court; a judgment or final order of a court or officer inferior to the court of appeals may be reviewed in the court of appeals; and a judgment or final order of the court of appeals in convictions of a felony or the common pleas court in conviction of a felony or misdemeanor, and a judgment of the court of appeals involving the constitutionality of a statute; or a judgment in a case of public or great general interest may be reviewed by the supreme court. The supreme court in a criminal cause or proceeding, except when its jurisdiction is original, shall not be required to determine as to the weight of the evidence. (R. S. § 7356; 82 v. 16, 39; 80 v. 169; 103 v. 434.)

Jurisdiction in error.—This section was amended April 18, 1883 (80 O. L. 170). September 3, 1912, §§ 2 and 6 of article IV of the constitution were adopted, relating to the supreme court and the court of appeals. This section in its present form was adopted May 6, 1913. (103 O. L. 434.) § 13764 was enacted March 3, 1906. These dates are important in the consideration of the cases that have construed this section.

The granting of a motion for a new trial upon the ground of newly discovered evidence is necessarily committed to the wise discretion of the court, and a court of error can not reverse unless there has been a gross abuse of that discretion. And whether that discretion has been abused must be disclosed from the entire record. The new testimony proffered must neither be impeaching nor cumulative in character. Unless the trial court or court of error, in view of the testimony presented to the court, and jury, finds that there is a strong probability that the newly discovered evidence will result in a different verdict, a new trial should be refused. State v. Lopa, 96 O. S. 410.

Of common pleas court.—Upon reversal by the common pleas court of a judgment of conviction for violation of a municipal ordinance in a mayor's court, the cause should be remanded to the mayor's court for further proceedings, unless the ordinance in question is invalid, or no offense was charged in the affidavit. Akron v. Temple, 16 C. C. (N.S.) 327.

Where one who has been tried and convicted before the mayor of a municipal corporation for violation of an ordinance, applies under § 1752, Revised Statutes (G. C. § 4551) to the court of common pleas, or a judge thereof, for leave to file a petition in error to review the proceedings and judgment of the mayor, and the court, or judge, to whom the application is made, refuses to grant leave to file the petition in error, such refusal is not reviewable on error in the circuit court. Village of Canfield v. Brobst, 71 O. S. 42.

A conviction before a mayor under a municipal ordinance may be reviewed by the common pleas court, upon obtaining leave of the court or a judge thereof to file a petition in error in accordance with G. C. § 4551. Miller v. Bellefontaine, 2 C. C. 139, 1 O. C. D. 407.

It is not necessary to obtain leave to file petition in error, to review the judgment of a police court in a criminal case. Creadon v. State, 24 C. C. (N.S.) 264.

Where a petition to declare a certain residence district dry territory has been properly filed, with a common pleas judge, a hearing had, and a finding made that the territory is dry, the status of the territory will not be changed by a later finding by a mayor of the municipality that the territory is wet, even though the petition

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upon which the mayor acted was filed at an earlier date than that upon which the judge acted. Miller v. State, 23 C. C. (N.S.) 76.

Of circuit court.—Under the provisions of this section, it is competent for the circuit court in the first instance to take and entertain jurisdiction of proceedings in error to review the judgment of the mayor of an incorporated village convicting the defendant of a crime. State v. Mattingly, 79 O. S. 79.

For the purpose of such review, under the provisions of section twenty (20) of the act of the General Assembly entitled, "An act to provide for the enforcement of local option laws prohibiting the sale of intoxicating liquors as a beverage," passed February 23, 1906 (98 O. L. 12) the circuit court may grant leave to the convicted party to file a petition in error therein to review the judgment of conviction. State v. Mattingly, 79 O. S. 79.

Prior to the enactment of G. C. § 13764, the judgment of the court of common pleas reversing a conviction of a justice of the peace and discharging the defendant, could not be reviewed by petition in error filed by the state in the circuit court. Mick v. State, 72 O. S. 388.

Where one who has been tried and convicted before a magistrate for violation of the law against the sale of intoxicating liquors applies to the court of common pleas for leave to file a petition in error to review the proceedings and judgment of the magistrate, and the court to whom the application is made refuses to grant leave to file a petition in error, such refusal is not reviewable on error in the court of appeals. Deniel v. State, 1 O. A. R. 131, 18 C. C. (N.S.) 275, 24 O. C. D. 287.

Prior to the enactment, in 1906, of G. C. § 13764, it was held that the circuit court could not review on a petition in error filed in behalf of the state, a judgment of the common pleas court sustaining a demurrer to an indictment. State v. Simmons, 40 O. S. 305; State v. Bour, 10 C. C. 58, 4 O. C. D. 4; State v. Hance, 4 C. C. (N.S.) 541, 16 O. C. D. 273.

The refusal of the court of common pleas to allow a petition in error to be filed to review a conviction before a mayor for a violation of an ordinance is not reviewable in the circuit courts. Canfield v. Brobst, 71 O. S. 42.

The circuit court can not review a conviction in the court of common pleas, on petition in error, unless there is attached thereto a complete certified transcript as required by G. C. § 13753. Brown v. State, 2 C. C. 129, 1 O. C. D. 402; Champion v. State, 9 C. C. 315, 6 O. C. D. 82.

The court of common pleas therefore erred in reversing the judgment of the magistrate and in discharging the accused. Under force of § 13764 enacted subsequently to the decision of Mick v. State, 72 O. S. 388, we are required to reverse the judgment of the common pleas court, vacate the judgment of discharge and affirm the magistrate's conviction and sentence. State v. Berry, 13 C. C. (N.S.) 206.

When a motion for leave to file a petition in error is presented to the clerk of the circuit court, within the time prescribed by law, the court will not refuse to allow the petition to be filed on the ground that leave was not obtained within thirty days, when the court was not in session during that time. Miller v. State, 23 C. C. (N.S. 76.

Of supreme court under present law.—This court acquires both original and appellate jurisdiction directly from the constitution of the state as amended September 3, 1912. The general assembly has no power or authority to limit or increase that jurisdiction. State v. Mansfield, 89 O. S. 20.

Under the constitution of this state as amended September 3, 1912, this court has neither original nor appellate jurisdiction in cases of misdemeanors unless such

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ases involve questions arising under the constitution of the United States or of this tate, or questions of public or great general interest, or in cases the records of which re certified to this court by the judges of the court of appeals under the provisions f section 6 of article IV of the constitution. State v. Mansfield, 89 O. S. 20.

Sections 13682, 13683 and 13684, General Code, in so far as they purport to onfer upon the supreme court appellate jurisdiction in misdemeanors, are inconistent with the constitution as amended and therefore have no further force or ffect. The question of the jurisdiction of this court under the provisions of these ections in felony cases is not involved in this case and is not here decided. State v. Iansfield, 89 O. S. 20.

Under former laws.—At the time the Revised Statutes were adopted, the urisdiction of the supreme court and district court to review, on error, the judgments of the court of common pleas, in criminal cases, was in all respects concurent, and extended to every prejudicial error properly appearing in the record, ncluding the power to determine whether the verdict was against the weight of he evidence; but while the jurisdiction of the district court and its successor, the ircuit court, remained the same, the jurisdiction of the supreme court was, by he amendment to the Revised Statutes, § 7356, passed in 1883 (80 O. L. 170), so imited that "in the supreme court only errors of law occurring on the trial, or ppearing in the pleadings or judgment," could be reviewed. Wagner v. State, 42 O. . 537.

The "errors of law occurring at the trial" within the meaning of R. S. § 7356 s amended in 1883 (80 v. 170), that could be reviewed in this court included errors f law prejudicial to the defendant, occurring while the court was impaneling a ury for the trial. Hartnett v. State, 42 O. S. 568; Palmer v. State, 42 O. S. 596.

Supreme court has no jurisdiction over proceedings preliminary to the trial r subsequent to the judgment, unless the errors complained of appear in the leadings or orders with respect thereto, or in the final judgment. Wagner v. State, 2 O. S. 537.

In a criminal case pending on error in the circuit court the supreme court has o power under the constitution to hear, and determine a motion to suspend the xecution of sentence. The circuit court has such power. Webster v. State, 43). S. 696.

The clause of this section giving the supreme court the jurisdiction to review ll judgments of the circuit court in any case involving the constitutionality or onstruction of a statute—which need not be a case of felony or misdemeanor—onfers jurisdiction to review the judgment of the circuit court in a case where he charge is the violation of an ordinance, without reference to whether it is a onviction or not, if the constitutionality or construction of a law is involved. Van Wert v. Brown, 47 O. S. 477.

The supreme court will not entertain error proceedings if the application can e made as well in the common pleas court. Bartlett v. State, 22 O. S. 205.

This section does not authorize the supreme court to review a judgment of he circuit court reversing a judgment of conviction rendered by the court of common leas in a criminal case. State v. Josephs, 43 O. S. 457.

General Code § 13764 enacted in 1906 (98 O. L. 33), authorizes the supreme court n the application of the state, to review a judgment of the circuit court reversing a conviction rendered by the court of common pleas.

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Rulings of the court.—Overruling a motion to continue a case can not be reviewed on error, unless the court abuses its discretion. Loeffner v. State, 10 O. S. 598; Holt v. State, 11 O. S. 691.

On a motion for a new trial on the ground that since the witnesses are not credible the verdict is contrary to the evidence, the opinion of the common pleas, in refusing such motion, can not be reversed on error. Whitcomb v. State, 14 O. 282.

The power exercised by the court in dismissing a jury because they are unable to agree, is founded upon legal discretion, governed by no rules or fixed principles and may be reviewed on error. Dobbins v. State, 14 O. S. 493.

The rulings of a court can not be reviewed on error unless they are authenticated by bill of exceptions, or other proper entry of record made by order of such court. Goodin v. State, 16 O. S. 344.

The refusal of the court to give its opinion upon the weight or testimony, or to refuse to exclude from the jury evidence tending to prove the issue, but which is insufficient of itself for that purpose, is not error. Hummel v. State, 17 O. S. 628.

Where there is an examination to determine the sanity of the accused during his trial, error will not lie to review such proceedings either before or after his conviction. Inskeep v. State, 35 O. S. 482.

A judgment will not be reversed merely because the record shows error, to which exception was taken. The error, to be ground of reversal, must be prejudicial to the rights of the party complaining. And this is the rule in criminal as well as civil cases. McHugh v. State, 42 O. S. 154; Manson v. State, 24 O. S. 590; Gandolfo v. State, 11 O. S. 114.

In a proceeding to reverse a judgment in either a civil or criminal case, the court regards the record as free from error until the contrary clearly appears; and except as to matters relating to jurisdiction, or when counsel have overlooked a statute or decision of the court governing the case, the court confines itself, ordinarily, to the error alleged by the party complaining. McHugh v. State, 42 O. S. 154.

A new trial should not be ordered in a cause simply because some error has intervened. The error must prejudically affect the merits of the case and the substantial rights of one or both of the parties, and this is as true of the temporary absence of the judge as any other departure from the due process of law during the trial of a cause. Tingue v. State, 90 O. S. 368.

If the trial judge is temporarily absent during a part of the argument, in order to prepare his charge for the jury, and it is not claimed that any misconduct of counsel took place during such absence, such absence, if erroneous, is not prejudicial to the defendant. Tingue v. State, 90 O. S. 368 (distinguished Miller v. State, 73 O. S. 195).

Where no objection is taken by motion to quash or by demurrer, the court on error, based on the insufficiency of the indictment, will only inquire whether the facts averred constitute an offense punishable by statute. Kennedy v. State, 34 O. S. 310.

A proceeding to punish for contempt under G. C. § 12136, including the question whether or not the court, in awarding punishment, has exercised a reasonable discretion, may be reviewed upon error. Myers v. State, 46 O. S. 473.

Where one is imprisoned by order of a magistrate having jurisdiction, error and not habeas corpus is the proper remedy. Ex parte Shaw, 7 O. S. 81; Ex parte Mosler, 8 C. C. 324, 4 O. C. D. 82.

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S was tried and convicted by the mayor of an incorporated village, who had urisdiction over the offense, for violating § 7033-1, Revised Statutes (G. C. § 13047) hich prohibits the business of barbering on Sunday. He was sentenced to pay a ne of fifteen dollars and costs of prosecution, and upon his refusal to pay the same e mayor issued to the marshal of said village a mittimus, therein commanding at the prisoner be committed to the county jail until said fine and costs be paid, ithout including the words, "or secured to be paid," as provided in § 1536-793, evised Statutes. Thereupon S applied to a judge of the court of common pleas of e proper county for a writ of habeas corpus, and one was issued. As the author- y for holding S the said mittimus was submitted to the judge, who, being of the inion that the mittimus was defective because of the absence of said words, on plication for that purpose, gave leave to the mayor to amend the writ so as to clude said omitted words. The amendment was made accordingly, whereupon the tition for the writ of habeas corpus was dismissed. Held, it was not error to rmit the amendment. Stanfeal v. State, 78 O. S. 24.

Where the judgment of a lower court in a criminal prosecution is reversed on ror because of the imposition of an excessive sentence, the case will be remanded r proper sentence only. Dalrymple v. State, 5 C. C. (N.S.) 185, 16 O. C. D. 562.

A workhouse sentence having been illegally imposed for violation of the Valen- ne anti-trust law (G. C. §§ 6390 to 6402) will be set aside on review and the cause manded to the trial court for resentence, which may be by fine or imprisonment or th in the discretion of the court as on original hearing. Arnsman v. State, 11 C. C. N.S.) 113, 20 O. C. D. 445.

Upon reversal by the common pleas court of the judgment of a justice of the ace in a criminal case for error in the sentence alone, and remand for resentence, e justice has authority to resentence, notwithstanding the time has elapsed, after e trial, within which judgment must be rendered. Derby v. State, 6 C. C. (N.S.) , overruled in part. Yocheim v. State, 12 C. C. (N.S.) 430.

The specific provisions of §§ 4364-30zg and 4364-30zh, Revised Statutes (G. § 13246) control the prosecution of error proceedings brought to reverse a con- ction for violation of any law prohibiting the sale of intoxicating liquors in any ter- ory or district, or to reverse any judgment affirming such conviction, notwith- anding such provisions are inconsistent with more general provisions of other ctions of the Revised Statutes. Mitchell v. State, 78 O. S. 347.

By force of the provisions of the above cited sections the allowance by one judge the circuit court of a motion for leave to file a petition in error to reverse a dgment of the court of common pleas affirming a judgment of conviction for olation of any law prohibiting the sale of intoxicating liquors, does not give to ch court jurisdiction to try and determine the errors complained of. Mitchell v. ate, 78 O. S. 347.

The circuit court may grant leave to a party convicted of selling liquor in dry rritory, to file a petition in error therein to review the judgment of conviction. ate v. Mattingly, 79 O. S. 79.

The provisions of G. C. § 13246 requiring the granting of leave by the review- g court before a petition in error shall be filed to reverse a conviction for viola- on of a law prohibiting the sale of intoxicating liquors in a territory or district, not apply to a conviction under G. C. § 13223. Cannon v. State, 89 O. S. 469.

A general exception to the charge of a trial court does not raise any question error as to the omission of the court to give further correct instruction, but pre-

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sents only questions of errors of law existing in the charge as given. State v. McCoy, 88 O. S. 447.

The doctrine of res gestae, as applied to exclamations, should have its limits determined, not by the strict meaning of the word "contemporaneous," but rather by the causal, logical or psychological relation of such exclamations with the primary facts in controversy. State v. Lasecki, 90 O. S. 10.

An entry on the journal reciting the tender of a plea of guilty of assault and battery upon arraignment under an indictment charging shooting with intent to wound and shooting with intent to kill and its rejection by the state is admissible in evidence upon the trial of the accused under the indictment. Canter v. State, 90 O. S. 1

The tender of a plea of guilty of assault and battery by the accused upon arraignment under an indictment charging shooting with intent to wound and shooting with intent to kill, which tender is rejected by the state, is not a proper subject of record on the journal of the court. Canter v. State, 90 O. S. 1.

Where the question put to a witness is competent, or not objected to by counsel, and the witness answers, a part of which answer is competent and a part incompetent, a general objection to the whole answer is properly overruled, even though there be some objectionable matter in the answer. To save the objector's rights he should clearly indicate the part of the answer to which he objects and move its exclusion. If the court overrules such motion, he should then save his exception. State v. Lasecki, 90 O. S. 10.

If an expert witness is also the attending physician, and he gives his opinion based upon his personal knowledge, the state may show in a criminal case that such witness had made contradictory statements at other times as to his opinion concerning the same state of facts, knowledge of which he had acquired in such manner. Hoover v. State, 91 O. S. 41.

If evidence of other offenses is admitted for the purpose of proving intent, and such evidence is not sufficient to make out a prima facie case of guilt in such former transaction, it is error for the trial court not to instruct the jury to disregard such evidence. Such omission is not cured by a charge to the effect that the jury must find beyond a reasonable doubt that the defendant was guilty of such other offenses, before it could consider such evidence for any purpose. Baxter v. State, 91 O. S. 167.

While evidence of other offenses is competent for the purpose of showing intent, if criminal intent is a specific element of the crime charged, such evidence is of a very dangerous character, and should be admitted with great caution. Its admission by the court when it was absolutely insufficient to make anything like a prima facie case against the defendant as to these transactions, was error. Baxter v. State, 91 O. S. 167.

In a prosecution for rape, where the state has given evidence tending to prove that the prosecuting witness had contracted a venereal disease from the defendant by reason of his alleged forcible sexual intercourse with her, evidence that she had sexual intercourse with others than the defendant about the time of the alleged rape is admissible to show that the prosecuting witness might have contracted the disease from some person other than the defendant, but evidence that she tried to have sexual intercourse with other men or boys during that period is inadmissible for any purpose. The court did not err in ruling out such evidence. Angeloff v. State, 91 O. S. 361.

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In a prosecution for rape, it is not error for the prosecutor to comment to the ıry upon the appearance of the prosecuting witness claiming that she was apparıtly weak both in mind and body; or to comment to the jury upon the appearıce of the accused as he sat in court claiming that he was evidently a strong ıd powerful man. Frey v. State, 22 C. C. (N.S.) 607.

Express malice is no part of the offense charged in an indictment under that ırt of the provisions of G. C. § 13383-1, which relates to banking institutions, buildıgs and loan associations or trust companies. If the statement is false, and the ecused willfully and knowingly made or transmitted it to another, or circulated , the law implies malice, but the accused can not complain that the state was quired by the trial court to prove express malice on his part as an essential element the crime. The error is prejudical to the state, but not to the accused, for the ct, if it be a fact, that the act was done maliciously does not make it any less a ime. State v. Kollar, 93 O. S. 89.

A conviction in a police court may be reviewed by a proceeding in error in reuit court on the ground that it is against the weight of the evidence. Slaughr v. Columbus, 61 O. S. 53.

A judgment of conviction by a mayor for a violation of an ordinance is reewable on the weight of evidence. Flatau v. Mansfield, 14 C. C. 592, 7 O. C. D. 39.

A conviction for a misdemeanor before a mayor over which he has final ırisdiction, may be reviewed by a proceeding in error on the ground that the onviction is against the weight of the evidence. Koch v. State, 73 O. S. 131.

The defendant was tried in the police court of the city of Cincinnati on an sufficient affidavit. No objection to the affidavit was made in the police court. eld, that no offense was charged, no legal judgment could be rendered, and adantage could be taken of the insufficiency of the affidavit on error. Pope v. City, C. C. 499, 2 O. C. D. 285.

No exception was taken to the judgment, but as held in 12 O. S. 402, and 26 . S. 372, on a final judgment, it is entirely unnecessary to do so. Where the ıdgment on its face, under the laws, of which a court takes judicial notice, clearly erroneous, it is the duty of a reviewing court to correct it. Pope v. ity, 3 C. C. 499, 2 O. C. D. 285.

If an indictment upon which a defendant has been convicted and sentenced fatally defective, and charges no offense, such defendant in a proceeding in error, rosecuted by him to reverse such judgment, may avail himself thereof, though o demurrer was filed to the indictment, and there was no motion in arrest of the ıdgment. Geiger v. State, 5 C. C. 283, 3 O. C. D. 141.

Error may be prosecuted on exceptions taken to the rulings of the court on he trial of a criminal case as to the admission or rejection of evidence and as the court's charge to the jury, notwithstanding the motion for a new trial does ot allege said grounds. Searles v. State, 6 C. C. 331, 3 O. C. D. 478.

The presumption of law is that where error has intervened in a criminal ase, it is prejudicial to the defendant. Bennett v. State, 10 C. C. 84, 4 O. C. D. 129.

The testimony must be both erroneous and prejudicial before a judgment will e reversed because of its introduction to the jury. Where the testimony as a hole established no fact prejudicial to either the witness or accused, but there nothing in this testimony that could by any construction have had the least

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weight with the jury in determining the verdict, it was of no benefit to the state, nor injury to the plaintiff in error, and its admission will not be sufficient ground for a reversal of the judgment. Moran v. State, 11 C. C. 465, 5 O. C. D. 234.

The circuit court has no jurisdiction, under § 7356, to review a conviction and sentence in the court of common pleas, on a petition in error, unless there is attached to and filed with such petition in error, a complete certified transcript of the record in the case, as provided in § 7358. Brown v. State, 2 C. C. 129, 1 O. C. D. 402.

A conviction before the mayor, under an ordinance of any municipal corporation, may be reviewed by the court of common pleas. The proceeding to obtain such review shall be by petition in error. No such petition in error shall be filed except on leave of the court or judge thereof, Revised Statutes § 1752. Miller v. Bellefontaine, 2 C. C. 130, 1 O. C. D. 407.

The fact that this section exempts the supreme court from passing on the weight of the evidence, makes it the duty of all other courts to consider it. Kimmerline v. State, 5 N. P. (N.S.) 417, 18 O. D. 95.

Court's ruling on motion for change of venue can not be reviewed on error, unless the court abuses its discretion. Hotelling v. State, 3 C. C. 630, 2 O. C. D. 366.

A plea of guilty to an indictment which does not contain facts sufficient to constitute a crime, does not prevent a prosecution in error by the accused, to have judgment reversed. Hogue v. State, 3 C. C. (N.S.) 315, 13 O. C. D. 567.

One pleading guilty to a misdemeanor under an invalid ordinance does not waive his right to prosecute error. Frank v. Cincinnati, 5 N. P. 520, 7 O. D. 544.

A prosecuting attorney may effectively waive the issuance and service of summons in error and enter the appearance of the state by a proper indorsement for that purpose upon a petition in error filed for the reversal of a conviction for crime or misdemeanor. Nichols v. State, 71 O. S. 335.

As a general rule an application by a prosecuting attorney for leave to file a bill of exceptions to the decisions of the court in a criminal case before the prosecution is ended will be overruled. State v. Dickerson, 73 O. S. 193.

The discretion vested in the court of common pleas, to require the prosecuting attorney to elect upon which of two or more counts in an indictment he will proceed, is judicial; and an order requiring an election to be made, where the election may deprive the state of a substantial legal right, is reviewable on error. State v. Bailey, 50 O. S. 636.

For prosecution of error by the state, see G. C. §§ 13764, 13681, et seq., and cases thereunder.

Objection to jury.—The opinion of the court overruling a challenge to a juror, can not be reviewed unless the record shows affirmatively that it contains all the evidence submitted to the court below on the question. Cooper v. State, 16 O. S. 328.

An objection that the jury was not properly sworn can not be considered on error unless the bill of exceptions shows the form of the oath that was actually administered. Bartlett v. State, 28 O. S. 669.

Court's action permitting the jury to separate can not be reviewed on error unless court abuses its discretion. Davis v. State, 15 O. 72.

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The court may review the legality of the discharge of a jury on a former ial. Ladd v. State, 5 C. C. 276, 3 O. C. D. 137.

An order of a trial court keeping the jury together can be reviewed on error ly when the court abuses its discretion. Hotelling v. State, 3 C. C. 630, 2 O. D. 366.

Under the rule that only matters which are brought into the record can be nsidered by the circuit court on review, a verdict of conviction will not be set aside the ground that a true copy of the panel as returned by the sheriff was not livered to the accused as required by § 7273, Revised Statutes (G. C. § 13648) here the irregularity complained of is not carried into the bill of exceptions, it is brought to the attention of the court by an affidavit to which is tached a paper writing and what purports to be a copy of the jury panel. illiams v. State, 11 C. C. (N.S.) 4, 20 O. C. D. 342 (affirmed, 53 W. L. B. 28).

Defects in indictment.—After plea, verdict and judgment, defects in the rm of an information, or in the manner in which an offense is charged can not raised for the first time on error. Bartlett v. State, 28 O. S. 669.

Where error is based on the insufficiency of the indictment and no objection s been made by a motion to quash or by demurrer, the court will only inquire ether the facts averred constitute an offense punishable by statute. Kennedy State, 34 O. S. 310.

Where no objection was made to an insufficient affidavit in police court, adntage of such insufficiency can be taken by proceedings in error. Pope v. State, 3 C. 497, 2 O. C. D. 285.

Where an indictment is fatally defective error may be prosecuted though no murrer was filed or motion in arrest made. Geiger v. State, 5 C. C. 283, 3 O. C. 141.

One who has not raised the question of repugnancy in an indictment by a mon to quash can not prosecute error thereon even though his co-defendant filed notion to quash which was overruled. Jones v. State, 14 C. C. 363, 7 O. C. D. 724.

A plea of guilty to an indictment which does not contain facts sufficient to nstitute a crime, and the payment of the fine and costs adjudged by the court on such plea, will not prevent a prosecution in error by the accused to have such dgment reversed. Hogue v. State, 3 C. C. (N.S.) 315, 13 O. C. D. 567.

Final order of court.—Where the court of appeals found that the trial urt erred in overruling the motion of the accused to direct a verdict of acquittal the close of the evidence, it was proper, upon such reversal of the judgment, to der the defendant discharged. Where, however, the supreme court finds that the erruling of such motion was not error, but affirms the judgment of reversal for other reason, the accused must be remanded to the custody of the trial court further proceedings according to law. State v. Tippie, 89 O. S. 35.

Where an order of the probate court appropriating land for the roadbed of a railad company is reversed in the court of common pleas, the court retaining "the use for trial and final judgment as in other cases," error will not lie to such judgnt of reversal. Railway v. Bailey, 39 O. S. 170.

An order made by a judge in extradition proceedings is not reviewable on error. eldon v. McKnight, 34 O. S. 316.

Where the court on application of the defendant who is indicted for a crime, ntinues the case to the next term of the court at his costs, and renders a judgment

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against him for the same, and orders execution for the same, a writ of error will not lie to reverse such judgment, until final judgment in the prosecution; and where the record does not show such final judgment the writ will be dismissed. Cochrane v. State, 30 O. S. 61.

A writ of error can not be allowed before final judgment in the court below. Kinsley v. State, 3 O. S. 508.

A writ of error only lies to a final judgment; and if it appear by the record produced that the court below have not yet given final judgment, the writ will be quashed. Spitler v. Ohio, W. 106.

Time.—Section 6723, Revised Statutes (G. C. § 12270) which fixes a limitation of four months for the commencement of proceedings to reverse, vacate or modify a judgment or final order, does not govern the time within which proceedings may be commenced to reverse a sentence and judgment in a criminal case, and there being no provision of statute fixing such limitation, a motion on the part of the accused presented to this court for leave to file a petition in error twenty-two months after the rendition of the judgment complained of, will not be refused on the ground that it is not filed in time. Miller v. State, 73 O. S. 195.

Under § 109 of the code of civil procedure (Sayler, 2185, § 190) the time for allowing writs of error, in criminal cases not punishable with death, is not limited to three years from the rendition of the judgment, as in civil cases. Blackburn v. State, 22 O. S. 581.

Where the court on application of the defendant, who is indicted for a crime, continues the case to the next term of the court at his costs, and renders a judgment against him for the same, and orders execution for the same, a writ of error will not lie to reverse such judgment, until final judgment in the prosecution; and where the record does not show such final judgment, the writ will be dismissed. Cochrane v. State, 30 O. S. 61.

While "a speedy public trial by an impartial jury" is guaranteed to every person accused of crime, the right to review a conviction, on error or otherwise, is not guaranteed, but depends solely on statutory provision. Wagner v. State, 42 O. S. 537.

As the law now stands, the proceedings in error in criminal cases may properly be brought after the expiration of six months from the rendition of the judgment complained of. Section 6723, Revised Statutes, does not apply to such cases. Nickel v. State, 6 C. C. 601, 3 O. C. D. 605.

Judgment reversed when.—A verdict or judgment will not be set aside on the ground that it is contrary to the weight of the evidence unless it is clearly so. Spears v. State, 2 O. S. 583.

A judgment can not be reversed because the verdict is contrary to the evidence, unless it is manifestly so; and the reviewing court will always hesitate to do so, when the doubt of its propriety arises out of a conflict in oral testimony. Breese v. State, 12 O. S. 146; Moran v. State, 11 C. C. 464, 5 O. C. D. 234; Blythe v. State, 4 C. C. 435, 2 O. C. D. 636.

A verdict will not be disturbed unless it is clearly and manifestly contrary to the weight of the evidence. Martin v. State, 17 C. C. 406, 9 O. C. D. 621.

Where the evidence is conflicting the verdict will not be set aside unless it is manifestly against the weight of the evidence. Turner v. State, 5 C. C. 537, 3 O. C. D. 263.

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A judgment will not be reversed on the ground that the verdict is contrary › the weight of the evidence unless the record shows affirmatively that all the ›idence is set forth in the bill of exceptions. Cantwell v. State, 18 O. S. 477.

It is only when the verdict is so manifestly against the weight of the evidence s to induce the opinion that it was the result of passion or prejudice, or the clear esult of a mistake on the part of the jury, that the court ought to interfere with ıe verdict. Schneider v. State, 2 C. C. 420, 1 O. C. D. 565.

Whether a bank note offered in evidence on an indictment for counterfeiting, be ıbscribed H. or N. Biddle is a question of fact, and the decision upon it can not be ıised in error, unless the note accompanies the record. Quaere, if it can be alleged ; error. Hess v. State, 5 O. 1.

In a prosecution for rape, where the evidence discloses that the hands of the rosecuting witness were both free, and that people were in the room above that here the act occurred and no outcry was made: Held, not sufficient to support a onviction. Frey v. State, 22 C. C. (N.S.) 607.

ec. 13752. Transcript to be furnished on demand and tender of fees.

On application, by or on behalf of the accused, to an officer reuired to make a record or docket entries in such case, and upon ender of the proper fee, such officer shall make and deliver to such ccused or his counsel a complete certified transcript of the record, mitting, if so requested, a bill of exceptions therefrom. If the rosecution was before a court or tribunal in which a complete ecord is not made, such officer shall so make and deliver a certified ranscript of the judgment and all entries in the case, and on receipt f a copy of a summons as hereinafter mentioned, shall forward, to he clerk of the court, the original papers in the case. (R. S. § 7357; 0 v. 46.)

Under the provisions of § 199 of the code of criminal procedure (66 v. 317), certified transcript of the proceedings must be filed, with an application for a rit of error, as required in civil cases when said code was adopted. This requireıent is not affected by the subsequent amendment of the code of civil procedure, llowing the original papers and pleadings to be filed with a petition in error in ivil cases. Stanley v. State, 23 O. S. 581.

Unless a complete transcript is attached, the case will be dismissed. Brown . State, 2 C. C. 129; Johnson v. State, 4 C. C. 524; Champion v. State, 9 C. C. 15, 2 O. C. D. 171, or the court may on proper application order a proper tranıript to be filed. Little v. State, 8 C. C. 51, 1 O. C. D. 212.

When it is objected on error that the court sentenced defendants without first nforming them of the verdict of the jury, as required by G. C. § 13694, the record ıust show affirmatively that the court omitted this duty, the presumption being hat the court did as the law directs. Bartlett v. State, 28 O. S. 669.

The record of a conviction for crime must show that the defendant was araigned on the indictment. Hanson v. State, 43 O. S. 376.

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Sec. 13753. Proceedings to review to be by petition in error.

The proceedings to review such judgment shall be by petition in error, to which shall be attached such transcript, and any original papers received by the clerk. It shall not be necessary to include in the transcript of the record any bill of exceptions, but the original bill of exceptions may be attached in lieu of the transcript of the record thereof. The court in which the review is sought, by summary process, may compel a more complete record to be furnished, and such original papers to be forwarded. (R. S. § 7358; 80 v. 46.)

Upon a writ of error, nothing is examinable but what is set forth in the transcript of the record. Osborn v. State, 7 O. 212.

A bill of exceptions taken in a trial before a justice of the peace in a criminal case is not required to be entered upon the docket. It is sufficient if it be allowed and signed by the justice and filed with the papers in the case, and an entry of these facts with the date thereof is made on his docket. State v. Ransick, 62 O. S. 283.

The attachment of a transcript to the petition in error as required by § 7358, Revised Statutes, is not requisite to jurisdiction. The court has power in such case, where objection is made, to allow an amendment permitting the transcript to be attached. The requirement may be waived, and where no objection is taken in the first instance, it will be held to be waived. State v. Ransick, 62 O. S. 283.

By virtue of the requirements of section 13246, General Code, one who has been convicted before a mayor for a violation of the law prohibiting the sale of intoxicating liquors in a city, which judgment has been affirmed by the common pleas court, must, before filing a petition in error in the court of appeals, obtain leave of that court after good cause shown therefor and within the time limited in said section. Moorey v. State, 6 O. A. R. 462.

In computing the time within which the same must be filed, the language of the statute, "When a reviewing court is not in session," means not in session in the county in which the litigation is pending, unless the court has fixed some other county of the appellate district for the hearing of such cases; and the court of appeals is not to be deemed in session in the county in which the litigation is pending simply because the term of court therein has been formally held open. Moorey v. State, 6 O. A. R. 462.

The plaintiff in error seeking to reverse a judgment of the court of common pleas in a prosecution for a misdemeanor should attach a transcript of the complete record to his petition in error, and if he fails to do so, the petition in error will be dismissed. Champion v. State, 9 C. C. 315, 5 O. C. D. 82.

Section 6565, Revised Statutes, applies to the taking of exceptions before a justice of the peace, in all cases, civil as well as criminal, and, therefore, by the express provision of this section, the bill of exceptions is not required to be copied into the record or docket of the justice. Ransick v. State, 15 C. C. 371, 8 O. C. D. 306.

A bill of exceptions taken before a justice of the peace must be filed with the clerk of the common pleas within ten days to avail plaintiff in error. Ransick v. State, 15 C. C. 371, 8 O. C. D. 306.

To authorize the review of a judgment of conviction for a misdemeanor, it is necessary that a certified transcript of the record, including the bill of exceptions, be attached to the petition in error. Ickes v. State, 16 C. C. 31, 8 O. C. D. 442 (affirmed, 63 O. S. 549).

A record on error from the police court of Cuyahoga county, containing no certificate of journal entries, transcript and the bill of exceptions and papers not being attached to the petition in error, is defective, and the questions raised therein will not be considered on error. Terry v. State, 22 C. C. 16, 12 O. C. D. 274.

A verdict will not be reversed on error unless it is clearly against the evidence. Terry v. State, 22 C. C. 16, 12 O. C. D. 274.

A reviewing court is not bound to notice errors which are not specially assigned and will not do so where substantial justice does not require it to be done. Booth v. Hubbard, 8 O. S. 243.

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Section 6723, Revised Statutes (G. C. § 12270) which fixes a limitation of four months for the commencement of proceedings to reverse, vacate or modify a judgment or final order, does not govern the time within which proceedings may be commenced to reverse a sentence and judgment in a criminal case, and there being no provision of statute fixing such limitation, a motion on the part of the accused presented to this court for leave to file a petition in error twenty-two months after the rendition of the judgment complained of, will not be refused on the ground that it is not filed in time. Miller v. State, 73 O. S. 195.

The rulings of a court can not be reviewed on error, unless such rulings are authenticated by bill of exceptions, or other proper entry of record made by order of such court. Goodin v. State, 16 O. S. 345.

A verdict of conviction will not be set aside on the ground that a true copy of the panel was not delivered to the accused as required by G. C. § 13648, where the irregularity complained of is not carried into the bill of exceptions, but is brought to the attention of the court by an affidavit to which is attached a paper writing and what purports to be a copy of the jury panel. Williams v. State, 11 C. C. (N.S.) 4, 20 O. C. D. 342.

The requirement that a certified transcript of the proceedings must be filed with an application for a writ of error, as required in civil cases, was not affected by the subsequent amendment of the code of civil procedure, allowing the original papers and pleadings to be filed with a petition in error in civil cases. Stanley v. State, 23 O. S. 581.

Where a petition in error is filed in the circuit court without a complete transcript the court may require a certified transcript of such record to be filed, and if done it may proceed to hear and determine the case. Little v. State, 8 C. C. 51, 4 O. C. D. 285.

A transcript must show that a motion for a new trial was made on the ground that the judgment is contrary to the weight of the evidence or the case can not be considered on error. Little v. State, 8 C. C. 51, 4 O. C. D. 285.

A petition in error, not accompanied by a complete certified transcript, on motion, will be stricken from the files. Johnson v. State, 4 C. C. 524, 2 O. C. D. 687.

Sec. 13754. Summons in error to issue, and how served.

When such petition, and a precipe, are filed in a court, a summons in error, returnable in ten days, shall be issued by the clerk thereof unless a judge thereof prescribe another day for such return. Such summons shall be directed to the sheriff of the county in which the judgment was rendered, and it shall contain such description of the judgment as to identify it, recite the fact that a petition in error has been filed, command the sheriff to notify the prosecuting attorney of the time it will be for hearing, and, if original papers are required, command the sheriff to notify the officer, in whose possession they are, to forward them to such clerk. If such summons issue from the supreme court, the clerk thereof shall forward it to the sheriff by

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mail, and a copy thereof to the attorney-general by mail. (R. S. § 7359.)

Where an offense was committed in Hamilton county, in a village which is situated both in Hamilton county and Clermont county, and the trial was held and judgment rendered at the situs of the village which is in Clermont county, the prosecution of error must be to the common pleas court of Clermont county, and where such proceedings are filed in Hamilton county the court is without jurisdiction and the proceedings must be dismissed. Theobald v. State, 12 N. P. (N.S.) 390, 22 O. D. 586.

In the prosecution of error proceedings in an action by a wife against her husband for failure to provide for their minor child, service of summons in error upon the attorney representing the wife or waiver of service by him does not give the reviewing court jurisdiction, and the state can be brought into court only by service on or waiver of service by the prosecuting attorney or some one duly authorized by him to act in that behalf. Stryck v. State, 25 C. C. (N.S.) 106.

Forms for petition in error.

Supreme Court of Ohio.

E F, Plaintiff in Error,
v.
The State of Ohio, Defendant in Error. } Petition in Error.

The said E F, plaintiff in error, complains of the State of Ohio, defendant in error, for that at the ——— term of the ——— court of ———county, A. D. 19—, the said State of Ohio recovered a judgment by the consideration of said court, against the said E F, in a certain action of indictment then pending in said court, wherein the said State of Ohio was plaintiff and the said E F was defendant, a transcript of the record in which case, duly certified, is hereto attached, marked A; † and the said E F says that there is error in the said record, in this, to-wit (state and number the grounds of error). The said plaintiff in error prays that said judgment may be reversed and that he may be restored to all things he has lost by reason thereof.

G. H. Attorney for Plaintiff in Error.

Court of Common Pleas, ——— County.

E F, Plaintiff in Error,
v.
The State of Ohio, Defendant in Error. } Petition in Error.

The said E F, plaintiff in error, complains of the said State of Ohio, defendant in error, for that, on the ——— day of ———, A. D. 19—, the said State of Ohio recovered a judgment against the said E F, by the consideration of A B, a justice of the peace (or, mayor of the village of ———), in a certain action then pending

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before the said A B, wherein the said State of Ohio was plaintiff and the said E F defendant, a transcript of the judgment and all entries in said case, duly certified, is hereto attached, marked A. (Follow preceding form from the †.)

G H, Attorney for Plaintiff in Error.

Precipe to petition in error.

Court of Common Pleas, ——— County.

E F, Plaintiff in Error,
v.
The State of Ohio, Defendant in Error. } Precipe.

To the clerk:

Issue summons in error in this cause, returnable according to law. In said summons in error, direct the sheriff of said county to notify A B, a justice of the peace in and for said county (or, mayor of the village of ———), to forward to you the original papers (or a particular paper, describing it), in his possession, filed in the action referred to in the foregoing petition in error.

G H, Attorney for Plaintiff in Error.

Summons in error.

Court of Common Pleas, ——— County.

State of Ohio, ——— county.

To the sheriff of the county of ———:

You are hereby commanded to notify O P, the prosecuting attorney of the county of ———, that E F has filed a petition in the clerk's office of the court of common pleas of ——— county, asking a reversal of a judgment which the State of Ohio obtained against the said E F, on the ——— day of ———, A. D. 19—, by the consideration of A B, a justice of the peace (or, mayor of the village of ———); and that the said O P appear before said court of common pleas, on the ——— day of ———, A. D. 19—, when said petition will be for hearing, to show cause, if any there be, why the said judgment should not be reversed. And you are commanded to notify the said A B to forward to me, on or before the ——— day of ———, A. D. 19—, the original papers (or a particular paper, describing it) in his possession, and filed in a certain action, lately pending before him, the said A B, in which the State of Ohio was plaintiff, and E F defendant.

You will make due return of this summons on or before the ——— day of ———, A. D. 19—.

Witness my hand and the seal of said court, this ——— day of ———, A. D. 19—.

C D,
Clerk of Court of Common Pleas of ——— County.

Return of summons in error.—The summons in error is returnable in ten days, unless the judge of the court in which the petition in error is filed, prescribe another day for the return.

Entry—Time for return of summons in error extended.

(Title.)

On motion, it is ordered that the summons in error issued in this cause be made returnable on the ——— day of ———, A. D. 19— (or, on the first day of the next term of this court).

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Furnishing of complete record and original papers.

Suggestion of diminution of record.

(Title.)

The defendant in error suggests to the court that there are certain defects in the transcript of the record filed in this cause, to-wit (state the defects). Wherefore, the said defendant in error moves that an order be sent to the ——— court of ——— county (or, to A B, a justice of the peace), to certify up to this court whether the said defects do exist in the record of said proceedings, now remaining in said court, and also a true transcript of said proceedings in said court below.

Entry—Granting motion.

(Title.)

The defendant in error having suggested to the court that in the transcript of the record filed in this cause there are the following defects, to-wit (state defects), and having moved the court that an order be sent to the ———court of ——— county (or, to A B, justice of the peace), to certify up to this court, whether the said defects do exist in the record of said proceedings now remaining in said court, and also a true transcript of said proceedings in said court below; it is ordered that said order issue as prayed for, and that said ——— court (or, said justice) certify as prayed for, and that said ——— court (or, said justice) send up a true transcript of said proceedings in said court; and it is further ordered that a certified copy of this order be served on said court (or, said justice), and said court (or, said justice) is required to make its return to the same forthwith.

Sec. 13755. What judgment may be rendered therein.

Upon the hearing of a petition in error, the court may affirm the judgment or reverse it, in whole or in part, and order the accused to be discharged or grant a new trial. In capital cases, when the judgment is affirmed, and the day fixed for the execution of the sentence is passed, the court shall appoint a day therefor, and the clerk thereof shall issue a warrant, under the seal of such court, to the sheriff of the proper county, commanding him to carry the sentence into execution at the day so appointed. Such sheriff shall execute and return such warrant, and such clerk shall record such warrant and return as provided in this title. (R. S. § 7360; 63 v. 35, § 3; S. & S. 618.)

The record must show error.—Error must appear affirmatively on the face of the record; it will not be presumed. Bartlett v. State, 28 O. S. 669; Bond v. State, 23 O. S. 349.

Also, that it was to the prejudice of the party seeking to take advantage of it. Young v. State, 6 O. 438; Berry v. State, 31 O. S. 219; Cantwell v. State, 18 O. S. 477; Brown v. State, 18 O. S. 496.

Allegations of facts made in a motion for a new trial, not supported by the record, nor made part thereof by bill of exceptions, can not be considered upon proceedings in error. Waggoner v. State, 30 O. S. 575.

Notwithstanding the plea of guilty, the sentence must be reversed if the indictment does not charge an offense, although there was no motion in arrest. Davis v. State, 19 O. S. 270.

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On error, the court will not regard any matter, purporting to be a part of the record, which is not a proper matter of record. Goldsmith v. State, 30 O. S. 208; Young v. State, 23 O. S. 577; Garner v. White, 23 O. S. 192; Wells v. Martin, 1 O. S. 386.

When a bill of exceptions refers to an exhibit attached to and made part thereof, only as containing the testimony admitted at the trial, the reviewing court can not consider any statement in said exhibit purporting to recite rulings admitting or excluding evidence made by the court before which the case was tried. Dunn v. State, 23 O. S. 167.

In order to prosecute error on the ground that the verdict is "contrary to evidence," and "against the weight of the evidence," the bill of exceptions must set out all the evidence. Wilson v. State, 2 O. S. 319.

If the bill of exceptions does not show the evidence upon which the trial court based its instructions to the jury, it must be presumed that the proceedings in the trial court were regular if the charge in question could be justified by any possible condition of the evidence. Snyder v. State, 92 O. S. 167.

If it appears that the trial court charged the jury upon the question of assault, and the bill of exceptions does not set forth the charge in full, it will be presumed that the trial court defined the offense of assault so clearly that the jury understood its essential elements. Snyder v. State, 92 O. S. 167.

In a criminal case, especially where the evidence is chiefly circumstantial, the supreme court does not consider the evidence in order to determine where the preponderance is, and the judgment will not be reversed upon the ground that the evidence was more consistent with the theory of suicide than of murder. Hoover v. State, 91 O. S. 41.

In proceedings to reverse a judgment, in either a civil or a criminal case, the court regards the record as free from error until the contrary clearly appears; and except as to matters relating to jurisdiction, or where counsel have overlooked a statute or decision of this court governing the case, the court confines itself, ordinarily, to errors alleged by the party complaining. McHugh v. State, 42 O. S. 154.

A judgment will not be reversed merely because the record shows error, to which exception was taken. The error, to be ground for reversal, must be prejudicial to the rights of the party complaining. Ib.

The transcript of the evidence given by witnesses at a former trial of the same defendant in the same criminal proceeding, as to the good character and the reputation of a certain witness for truth and veracity is not admissible if it is not shown that such witnesses are dead or are absent through the connivance or by the procurement of defendant even if they are outside of the state and the state is accordingly unable to obtain their evidence. State v. Huffman, 86 O. S. 229.

A journal entry, "It is hereby ordered that all cases not otherwise disposed of be and the same are continued to the next term of this court. Thereupon the October term, A. D. 1913, adjourned sine die this 31st day of December, 1913," which entry was in fact prepared on January 3, 1914, on which date the court actually did adjourn, and which journal entry is corrected subsequently so as to show that the common pleas court did not adjourn until January 3, 1914, does not dissolve or discharge a grand jury which was impaneled December 1, 1913, which filed its first and partial report on December 8, 1913, and which filed its second and final report on January 3, 1914. Such facts do not amount to a sufficient plea in abatement to an indictment returned January 3, 1914. State v. Rohrer, 90 O. S. 167.

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Record must show what excluded evidence tended to prove. Thurman v. State, 4 C. C. 141, 2 O. C. D. 466.

Where record does not show that defendant was present at a view, it is no ground for reversal. Martin v. State, 17 C. C. 406, 9 O. C. D. 621.

The question of the competency of evidence will not be considered where no exception was taken to its admissibility. Kohn v. State, 14 C. C. (N.S.) 31, 23 O. C. D. 417.

In order that affidavits used on a motion for new trial may be considered by a reviewing court, there must be a certificate of the trial judge that the affidavits in question were all the evidence introduced on the hearing of the motion. Berman v. State, 16 C. C. (N.S.) 106, 25 O. C. D. 386 (affirmed, 81 O. S. 508).

If a bill of exceptions shows that a package was originally attached thereto, and a string is found upon the bill which indicates that such attachment was actually made, the reviewing court will not refuse to consider the bill, although such package has been inadvertently taken from the bill. Scanlon v. State, 16 C. C. (N.S.) 115.

If exhibits are detached from the bill of exceptions by order of the trial court, the reviewing court will nevertheless consider them. Goode v. State, 17 C. C. (N.S.) 195.

If bottles which are introduced in evidence are labeled in a manner which is not set out clearly in the bill of exceptions, and it does not appear in what action they were introduced in evidence, or in what court such action was being heard, and there is a dispute as to the maner in which such bottles were attached to the bill of exceptions, the court will not regard the bill of exceptions as complete. Cohen v. State, 16 C. C. (N.S.) 178.

If the bill of exceptions shows that the court sentenced the accused to thirty days' imprisonment in the county jail and then to one year in the Ohio penitentiary, but the journal shows that the sentence was only for imprisonment in the Ohio penitentitary, the latter must prevail. Santo v. State, 17 C. C. (N.S.) 110.

If an improper remark by the court in the presence of the jury is relied upon as reversible error, the record must show that the jury was then present, or some members thereof. Townsend v. State, 17 C. C. (N.S.) 380, 25 O. C. D. 408.

Upon conviction in a police court for violation of a municipal ordinance of which that court took judicial notice, the bill of exceptions failing to show the terms of the ordinance, the higher courts will assume the existence of a valid ordinance authorizing the conviction, if the offense charged in the affidavit is one as to which the municipality has power to legislate. Gates v. Cleveland, 18 C. C. (N.S.) 349.

Where a motion for a new trial is overruled and no exceptions taken thereto and a second motion for a new trial made on the ground of newly discovered evidence is also overruled, to which exceptions are taken and the case taken on error to the circuit court, the record of the entire case is before the court for review. McLaughlin v. State, 20 C. C. (N.S.) 492.

Affirming judgment in part.—It is competent for the court, on the hearing of a writ of error to reverse in part, and to affirm in part, the sentence and judgment of a probate court in a criminal case. Montgomery v. State, 7 O. S. 107.

The judgment of the court of common pleas, in a criminal case, may be reversed in part and affirmed in part. Lougee v. State, 11 O. 68; Bonsal v. State, 11 O. 72.

The court has no power to order the accused to be confined in the workhouse until he enters into the bond required by G. C. § 13195; but the court should order that in default of such bond the place where such liquor is sold, furnished or given

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away, in violation of law, should be abated as a nuisance, within a day named by the court. Morrison v. State, 87 O. S. 506.

Court may order new trial.—The plea of not guilty upon the record is not reached by the judgment of reversal. The case comes up, on the second trial, on the issue as it stood before the reversal and no new plea is required. Sutcliffe v. State, 18 O. 469.

After a verdict of guilty, and judgment reversed on account of error in the proceedings, the prisoner is not protected from a second trial before a jury by the provision in the bill of rights, that "the accused shall not be twice put in jeopardy for the same offense." Sutcliffe v. State, 18 O. 469.

Under the constitution of this state, as amended September 3, 1912, this court has neither original nor appellate jurisdiction in cases of misdemeanors unless such cases involve questions arising under the constitution of the United States or of this state, or questions of public or great general interest, or in cases the records of which are certified to this court by the judges of the court of appeals under the provisions of § 6, of article IV, of the constitution. State v. Mansfield, 89 O. S. 20.

The judgment will not be reversed for a misdirection of the court to the jury on an abstract question of law, that could not arise upon the testimony, or influence the decision of the jury. Stewart v. State, 1 O. S. 66; Gill v. Sells, 17 O. S. 195; Lewis v. State, 4 O. 389.

A judgment can not be reversed because the verdict is contrary to the evidence, unless it is manifestly so; and the reviewing court will always hesitate to do so, when the doubt of its propriety arises out of a conflict in oral testimony. Breese v. State, 12 O. S. 146; Spears v. State, 2 O. S. 583.

A verdict will not be reversed on error unless it is clearly against the evidence. Terry v. State, 22 C. C. 16, 12 O. C. D. 274.

A verdict will not be disturbed unless clearly and manifestly wrong. Martin v. State, 17 C. C. 406, 9 O. C. D. 621.

It is only when the verdict is so manifestly against the weight of the evidence as to induce the opinion that it was the result of passion or prejudice, or the clear result of a mistake on the part of the jury, that the court ought to interfere with the verdict. Schneider v. State, 2 C. C. 420, 1 O. C. D. 565.

Before a reviewing court is justified in reversing a criminal case on the ground of the weight of the evidence it is said that the verdict must be found manifestly contrary thereto. Townsend v. State, 17 C. C. (N.S.) 380, 25 O. C. D. 408.

In a criminal case, as well as in a civil action, it may be assigned for error that the court overruled a motion for a new trial predicated upon the ground that the verdict was against the weight of evidence. O'Meara v. State, 17 O. S. 516; Crandall v. State, 28 O. S. 479.

The reviewing court should grant a new trial where the verdict fails to respond to the whole indictment in such manner as to authorize the court below either to sentence the accused or order his discharge. Fox v. State, 34 O. S. 377.

The refusal of the common pleas court to grant a new trial on the ground of newly discovered evidence, which is merely cumulative, is not ground for a reversal of the judgment. Loeffner v. State, 10 O. S. 598.

If no exception is taken to an order overruling a motion for a new trial, and subsequently another motion for a new trial on the ground of newly discovered evidence is filed, and such second motion is overruled and exception taken thereto, the circuit court considers the entire case, including the rules made at the trial

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which were then excepted to by the accused. McLaughlin v. State, 20 C. C. (N.S.) 492.

In a prosecution for contributing to the delinquency of a minor, the affidavit, in order to charge a crime, must allege that the minor is under eighteen years of age and is a delinquent within the meaning of the statute, and that the defendant is guilty of contributing to such delinquency, and the judgments of the lower courts will be reversed and the cause remanded. Willison v. State, 3 O. A. R. 244, 21 C. C. (N.S.) 526.

Where, in the trial of an accused upon an indictment charging rape, as of the date of October 9, 1912, the prosecuting witness, a girl about ten years of age, testified, in May of the following year, that she thought the act was committed in August of the preceding year, but could not say what time in August it was committed, and other facts and circumstances were offered in evidence by the state tending to show that the act was probably committed at a later date, a verdict of guilty is sustained by the evidence, and a new trial will not be granted, whether the jury believes the prosecuting witness was correct or mistaken in her testimony as to the date of the offense, provided, however, it clearly appears from the evidence that it is one and the same act charged in the indictment to have been committed on or about the ninth day of October. Angeloff v. State, 91 O. S. 361.

In a trial for contributing to the delinquency of a girl, judgment will not be reversed because the negative averments of G. C. § 1642, relating to jurisdiction over and with respect to delinquent and dependent and neglected minors, are not incorporated in the affidavits under which arrests are made. Walton v. State, 3 O. A. R. 97, 19 C. C. (N.S.) 452.

If the trial court erroneously refuses to hear and determine a motion for a new trial upon its merits, the circuit court must reverse the order refusing to hear such motion and remand the case to the trial court to hear and pass upon such motion for a new trial. Armstrong v. State, 15 C. C. (N.S.) 368, 24 O. C. D. 384.

Upon reversal by the common pleas court of a judgment of conviction for violation of a municipal ordinance in a mayor's court, the cause should be remanded to the mayor's court for further proceedings, unless the ordinance in question is invalid, or no offense was charged in the affidavit. Akron v. Temple, 16 C. C. (N.S.) 327.

Picturesque and exaggerated language used by counsel for the state in addressing the jury in a criminal case does not necessarily require a reversal of the conviction. Walker v. State, 18 C. C. (N.S.) 1.

The case of one arrested and examined before a justice of the peace in December, 1912, the transcript of which proceedings was filed in the common pleas court before the end of that month, was pending prior to January 1, 1913, and falls within the saving provision of the constitutional amendment which permits the prosecuting attorney to comment upon the fact that the accused failed to take the stand in his own behalf and the court to make reference thereto in the charge to the jury. Morrow v. State, 1 O. A. R. 95, 15 C. C. (N.S.) 561, 24 O. C. D. 140.

One can not be convicted of perjury for falsely swearing in a bastardy case before a justice of the peace, where the affidavit upon which the justice's jurisdiction depends shows that the complainant is a married woman. Brown v. State, 18 C. C. (N.S.) 198 (affirmed, 77 O. S. 636).

Court may discharge the accused.—When the circuit court erroneously affirms a conviction, the supreme court may reverse the judgment and discharge the accused. Ewing v. State, 82 O. S. 419.

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An acquittal or conviction for a minor offense included in a greater will not bar a prosecution for the greater if the court in which the acquittal or conviction was had was without jurisdiction to try the accused for the greater offense. Crowley v. State, 94 O. S. 88 (affirming 5 O. A. R. 48, 25 C. C. (N.S.) 113).

Where a person has been in jeopardy on the charge of assault and battery upon an affidavit filed with the mayor of a city, the plea of such jeopardy is insufficient as a bar to a prosecution by indictment for assault with intent to commit rape, although the facts alleged in the indictment, if proven to be true, would have warranted a conviction on the charge made in the affidavit. Crowley v. State, 94 O. S. 88 (affirming 5 O. A. R. 48, 25 C. C. (N.S.) 113).

Where a person who is convicted of a crime under a statute prescribing punishment by imprisonment in the penitentiary for a definite number of years, is given an indeterminate sentence, the question of the validity of the statute authorizing such indeterminate sentence can not be raised in a proceeding in habeas corpus. In re Allen, 91 O. S. 315; In re Winslow, 91 O. S. 328.

In the prosecution of one for embezzlement, a written contract between the accused and his alleged employer, which purports to be a contract of agency, is sufficient evidence of the fact of such agency; and it is error to discharge the prisoner under such facts. State v. Gross, 91 O. S. 161.

A promise to deliver counterfeit money at a future time can not be a basis for conviction of crime. Horton v. State, 85 O. S. 13.

Where all the facts appear of record, the court may of its own motion, consider whether the accused is not entitled to be discharged on the ground of former conviction or acquittal. Ladd v. State, 5 C. C. 276, 3 O. C. D. 137.

The mis-spelling of the name of the defendant in the indictment under which he was tried does not present a question which can be raised on a motion for arrest of judgment, and hence can not entitle defendant to his discharge. Smile v. State, 1 O. A. R. 402, 17 C. C. (N.S.) 500 (leave to file petition in error refused by supreme court).

If the principal and an aider and abettor are jointly tried under G. C. § 12916 and the principal is acquitted, judgment against the aider and abettor must be reversed, even though the verdict might have proceeded upon the ground that the principal's appointment as a special constable was defective, or that he unwittingly demanded the excessive fees which he exacted. State v. Nowak, 16 C. C. (N.S.) 596.

Court may remand for sentence.—Upon the reversal of an insufficient judgment, the proper course is to remand the cause to the court below for sentence and judgment upon the verdict. Williams v. State, 18 O. S. 46.

Where imprisonment and a fine are adjudged against a party for a single offense, and part of the sentence is found to be erroneous, the whole may be reversed; and, in such case, if the execution of the sentence has been suspended pending the proceeding in error, the case will be remanded for sentence and judgment. Pickett v. State, 22 O. S. 405.

Where the court of appeals found that the trial court erred in overruling the motion of the accused to direct a verdict of acquittal at the close of the evidence, it was proper, upon such reversal of the judgment, to order the defendant discharged. Where, however, the supreme court finds that the overruling of such motion was not error, but affirms the judgment of reversal for the other reason, the accused must be remanded to the custody of the trial court for further proceedings according to law. State v. Tippie, 89 O. S. 35.

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Where there is an equal division of opinion on a writ of error in a capital case, the defendant will be executed. Walton v. State, 1 Dec. Rep. 32, 1 W. L. J. 256.

Where a party has been erroneously sentenced on each of two counts in an indictment, a reviewing court can not annul the sentence on one count and sustain the other, but must remand for resentence. Devere v. State, 5 C. C. 509, 3 O. C. D. 249.

A sentence within legal limits can not be corrected on error, although it may seem too long to appellate court. Atkins v. State, 12 O. C. D. 716.

Where the judgment of a lower court in a criminal prosecution is reversed on error because of the imposition of an excessive sentence, the case will be remanded for proper sentence only. Dalrymple v. State, 5 C. C. (N.S.) 185, 16 O. C. D. 562.

Upon reversal by the common pleas court of the judgment of a justice of the peace in a criminal case for error in the sentence alone and remand for resentence, the justice has authority to resentence, notwithstanding the time has elapsed, after the trial, within which judgment must be rendered. Derby v. State, 6 C. C. (N.S.) 91; overruled in part, Yocheim v. State, 12 C. C. (N.S.) 430.

A workhouse sentence having been illegally imposed for violation of the Valentine anti-trust law, will be set aside on review and the case remanded to the trial court for resentence, which may be by fine or imprisonment or both, in the discretion of the court as on original hearing. Arnsman v. State, 11 C. C. (N.S.) 113, 20 O. C. D. 445.

The court of common pleas therefore erred in reversing the judgment of the magistrate and in discharging the accused. Under force of G. C. § 13764, enacted subsequently to the decision of Mick v. State, 72 O. S. 388, we are required to reverse the judgment of the common pleas court, vacate the judgment of discharge and affirm the magistrate's conviction and sentence. State v. Berry, 13 C. C. (N.S.) 206.

If the only error in proceedings in contempt is in the sentence which is imposed, the reviewing court may reverse and remand for a resentence. Grossner v. State, 18 C. C. (N.S.) 46 (affirmed, 86 O. S. 318).

It is no objection to a resentence of one whose first sentence has been reversed by a reviewing court and the cause remanded for resentence, that the plaintiff in error has suffered some part of the original erroneous sentence. Grossner v. State, 18 C. C. (N.S.) 46 (affirmed, 86 O. S. 318).

Where a question is asked which is objected to, and the objection sustained, in taking an exception there should be a statement of what it is proposed to prove, which must be something material, and the rejection of which as evidence would be prejudicial to the party excepting. Gandolfo v. State, 11 O. S. 114; Hummel v. State, 17 O. S. 628.

Where the array was challenged, under § 5175, for misnomer of a juror, which challenge was overruled, and it did not appear that the officer serving had acted in bad faith or that the accused had been injured by the mistake in any of his substantial rights, the error, if any was committed, afforded no ground of reversal. McHugh v. State, 42 O. S. 155, 160.

It is error, affording ground of reversal, to exclude evidence of a witness upon the ground that he had remained in court during part of the trial, and had heard other witnesses testify, and in so doing had violated an order of the court for the separation of the witnesses, neither the prisoner nor his counsel having encouraged such violation, and the witness being ignorant of the order. McHugh v. State, 42 O. S. 159.

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The refusal of the court to permit a defendant, on trial for crime, and who is a witness on his own behalf, to answer a question, will not authorize the reversal of the judgment, unless the record shows what he proposed to prove by the answer, and that it would be material. Oviatt v. State, 19 O. S. 573.

Where A was acquitted of one crime and convicted of another, evidence admitted solely to prove the first crime can not be made ground for a reversal. Manson v. State, 24 O. S. 590.

Where a question is excluded but the evidence sought is afterwards introduced there can be no reversible error. Gandolfo v. State, 11 O. S. 114.

Prejudicial error.—There must be error prejudicial to the defendant to justify a reversal. Scovern v. State, 6 O. S. 288.

A misdirection of the jury on an abstract proposition of law, that could not arise upon the testimony, or influence the jury, is not ground for reversal. Stewart v. State, 1 O. S. 66; see also, Lewis v. State, 4 O. 389; Gill v. Sells, 17 O. S. 195.

An erroneous instruction to the jury is not ground for the reversal of the judgment, where it clearly appears from the record that the party objecting thereto was not prejudiced thereby. Berry v. State, 31 O. S. 219.

Where part only of the court's charge to the jury is given in a bill of exceptions, and that part, taken by itself, is susceptible of two interpretations, one of which makes it erroneous, and the other makes it in accordance with law, it will be presumed that the jury, in the light of the whole charge, understood it in the latter sense. Davis v. State, 25 O. S. 369.

Reference to the testimony of an accomplice may be reversible error, if prejudicial to the accused. Kilbourne v. State, 84 O. S. 477.

An indictment under G. C. § 13104, for obtaining money by false pretenses must set forth the alleged false pretenses with such certainty and precision as will reasonably apprise the defendant of what he will be required to answer, and so that the court may determine what evidence is admissible and must allege that the pretenses were in fact false and made with intent to defraud, and failure of the indictment to set forth such alleged false pretenses is reversible error. Horton v. State, 85 O. S. 13.

Where a person is on trial for manslaughter, by running an automobile in a business and closely built up portion of a municipality at a greater rate of speed than is permitted by G. C. § 12604, it is not competent to prove such fact by an ordinance of the municipality defining what are the business and closely built up portions thereof (G. C. § 12608). State v. Horn, 85 O. S. 430.

It is error for the court in a criminal prosecution for violation of the county local option law to take judicial notice that such county had voted upon the question of local option and was dry territory. Geisse v. State, 85 O. S. 457.

General Code § 13675 was passed in order to make it the duty of the trial judge to charge the jury, and it was intended to change the rule laid down in Jones v. State, 20 O. S. 34, to the effect that the court was not bound of its own motion to instruct the jury. An omission to charge the jury that an indictment which charges shooting with intent to wound includes assault and battery, is erroneous; but such error is prejudicial to the state and not to the accused. State v. McCoy, 88 O. S. 447 (distinguishing Beaudien v. State, 8 O. S. 634).

One who embezzles or converts money is liable under G. C. § 12876, even if he intended to return it when he appropriated it for his own use, and if, in fact, he did return it eventually and the lower court erred in considering this a mere moral wrong and in ordering the jury to acquit the accused. State v. Baxter, 89 O. S. 269.

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A mistrial should not be ordered in a cause simply because some error has intervened. The error must prejudically affect the merits of the case and the substantial rights of one or both of the parties, and this is as true of the temporary absence of the judge as any other departure from the due process of law during the trial of a cause. Tingue v. State, 89 O. S. 368.

The admission of incompetent evidence in a criminal proceeding is not reversible error if the guilt of the accused is established to a moral certainty, excluding such evidence. State v. Reineke, 89 O. S. 390.

Where the question put to a witness is competent or not objected to by counsel, and the witness answers, a part of which answer is competent and a part incompetent, a general objection to the whole answer is properly overruled, even though there be some objectionable matter in the answer. To save the objector's rights he should clearly indicate the part of the answer to which he objects and move its exclusion. If the court overrule such motion, he should then save his exception. State v. Lasecki, 90 O. S. 10.

At the time proof of other similar offenses tending to show the corrupt course of dealing of a public official is offered in a trial for the solicitation of a bribe, the trial judge should limit its competency to the specific intent charged in the indictment, and if reference be made thereto in the charge, the same limitation should be made by the trial judge. State v. Davis, 90 O. S. 100.

In proving corrupt intent in the solicitation of a bribe, other similar offenses tending to show the corrupt course of dealing of a public official may be shown as tending to prove the specific corrupt intent charged in the indictment. Failure to limit such evidence to the specific corrupt intent charged in the indictment, however, is prejudicial error. State v. Davis, 90 O. S. 100.

If the door of a chicken house which is hung upon hinges is left open about fifteen inches and is thus held by means of a post on one side and a brick on the other, the act of moving such post and brick and opening such door so that it is half open is a forcible breaking, as an element of burglary, and it was not error for the court to refuse to charge that such facts did not constitute a breaking and entering. Goins v. State, 90 O. S. 176.

Where an indictment charges the offense of rape with consent under G. C. § 12414, it is error for the court to refuse to charge that if the evidence fails to show that the defendant is guilty of the completed offense under G. C. § 12414, the defendant may be convicted of an attempt to commit the offense. State v. Baltimore, 90 O. S. 196.

The writs of coram nobis and coram vobis do not exist in Ohio. The court of appeals erred in treating them as part of the criminal jurisprudence of the state, and its judgment, therefore, is reversed. State v. Hayslip, 90 O. S. 199.

If the court in a criminal proceeding states in its charge to the jury what admissions were made by defendant in open court, and defendant excepts to the charge as a whole except as to the statement concerning the admissions, the accuracy of such statement of the court in such charge concerning the admissions can not be considered by the reviewing court, and such statement is not, therefore, erroneous. State v. Vancak, 90 O. S. 211.

While the right to take life in self-defense exists where the slayer, in the proper and careful use of his faculties, believes in good faith and upon reasonable grounds that he is in imminent danger of death or great bodily harm and that his only means of escape from such danger will be by taking the life of his assailant, even if

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he is in fact mistaken as to the existence or imminence of the danger, it is not reversible error to charge that the appearance of danger must have been such as to alarm a man of ordinary firmness, if the undisputed evidence, including the testimony of the defendant, shows that he was a man of ordinary firmness. Napier v. State, 90 O. S. 276.

In an indictment for obtaining money under false pretenses, under G. C. § 13104, an averment as to the disposition which was to be made of such money is immaterial, and a variance between the indictment and the evidence is not fatal. Tingue v. State, 90 O. S. 368.

A charge given before argument to the effect that "Testimony has been admitted in the trial of this case tending to show that on Saturday evening, January 11, 1913, a conversation between A and her daughter B, the deceased, was held in the presence and hearing of the defendant C, and that defendant was silent and left the room without speaking. You are instructed that such silence is not a confession by the defendant of the commission of the crime charged in the indictment in this case, or of any crime, and that in themselves that conversation and defendant's silence are not sufficient to authorize a conviction of the defendant in this case. That evidence was admitted only for the purpose of allowing you to consider his conduct at that time and place, as tending, in connection with evidence of other facts, to prove the defendant guilty of the charge made against him by the indictment or included within its terms, and it is your duty to consider it for no other purpose whatever," in connection with the following provisions of the general charge: "Such evidence should be received and considered with care and caution, and with proper consideration of all circumstances and conditions that would be likely to influence the action of the defendant with a view to determining the motive that induced his silence, if you find he was silent. If it be doubtful whether the statements were perfectly heard or understood, by the defendant, or circumstances existed which might prevent a reply, or render it improper or inexpedient to reply, or if his silence may be attributed to any motive other than acquiescence in the truth of the statement to which his silent assent is claimed, the evidence would then be entitled to no weight or consideration for any purpose. It is your duty to follow the instruction of the court as to the purpose for which such evidence may be considered, and it is your province to determine the weight to be given such evidence for the purpose stated," is not erroneous to the prejudice of the accused. Hoover v. State, 91 O. S. 41.

One who is such an agent of another as to get possession of money for his principal and in the name of his principal, is such an agent that he may be convicted for the offense of embezzling such money, and it is error for the court to direct a verdict and discharge the accused upon the ground that the proof did not sustain the indictment which charged the accused with being the agent of The Cleveland National Fire Insurance Company and by virtue of such agency, coming into possession of the money which he embezzled. State v. Gross, 91 O. S. 161.

The fact that the witnesses offered by the state in a criminal prosecution differ as to the date of the commission of the offense charged in the indictment, does not constitute a variance between the allegations of the indictment and the proofs, but if it appears from the whole evidence that the witnesses for the state are testifying to different transactions, the state, at the close of its evidence, may be required to elect as to which transaction it will rely upon for conviction. Angeloff v. State, 91 O. S. 361.

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Rape with consent is constituted of the same elements as rape without consent. One of the elements of rape is assault, and if under such a charge an assault be proved, but not the rape, the defendant may be convicted of assault. Snyder v. State, 92 O. S. 167.

An acquittal or conviction for a minor offense included in a greater will not bar a prosecution for the greater if the court in which the acquittal or conviction was had was without jurisdiction to try the accused for the greater offense. Crowley v. State, 94 O. S. 88.

Where a person has been in jeopardy on the charge of assault and battery upon an affidavit filed with the mayor of a city, the plea of such jeopardy is insufficient as a bar to a prosecution by indictment for assault with intent to commit rape, although the facts alleged in the indictment, if proven to be true, would have warranted a conviction on the charge made in the affidavit. Crowley v. State, 94 O. S. 88.

Error is presumed to be prejudicial to the defendant in a criminal case. Bennett v. State, 10 C. C. 84, 4 O. C. D. 129.

Incompetent evidence is presumed to be prejudicial. Hanley v. State, 12 C. C. 597, 5 O. C. D. 495.

Prejudice not presumed from court's refusal to require prosecutor to make election. 6 C. C. 331, 3 O. C. D. 473.

Admitting incompetent evidence must be prejudicial as well as erroneous to be ground for reversal. Moran v. State, 11 C. C. 464, 5 O. C. D. 234.

The materiality of testimony will be considered by a reviewing court to determine whether it is prejudicial. Breck v. State, 4 C. C. 160, 2 O. C. D. 477.

Inasmuch as the rules of the Internal Revenue Department do not permit the removal of records from the offices of the collectors, and the state is without authority to compel the production of such records, an exemplified copy of so much of said records as will show that the defendant, on trial for alleged violation of the county local option law, had paid to the United States the special tax assessed against retail liquor dealers, of necessity becomes the best evidence that can be produced of that fact, and it is not error to permit its introduction. Folliard v. State, 14 C. C. (N.S.) 205, 22 O. C. D. 481.

Where a person is charged under G. C. § 1654 with contributing to the delinquency of a minor under seventeen years of age, by renting a room to her for the purpose of illicit intercourse, and the testimony shows that the minor went there for that purpose, it is not error to permit testimony to be given as to the reputation of the house in which such room is located. Smith v. State, 14 C. C. (N.S.) 257, 24 O. C. D. 661.

Where the character of the witness is attacked by showing his indictment and conviction upon a charge of felony wholly disconnected from the issue on trial, the trial court is not bound to permit counsel to go into details with reference to the crime so charged or specifically into the history of the witness' past life where the same is wholly immaterial and collateral. Diegle v. State, 14 C. C. (N.S.) 289, 23 O. C. D. 82.

The provision of G. C. § 13581, as to defects in an indictment which shall not be regarded as fatal, does not apply to the case of one who has been convicted of an infamous crime without having been arraigned on the indictment or having entered a plea thereto, and such an omission constitutes reversible error. Emmons v. State, 14 C. C. (N.S.) 351, 23 O. C. D. 516.

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Misconduct by the court or prosecuting attorney is of little moment to an cused person against whom evidence has been presented which establishes his guilt npletely. Hayes v. State, 14 C. C. (N.S.) 497, 25 O. C. D. 57 (affirmed, 83 O. S. 0).

The testimony of the magistrate before whom the accused was brought for his eliminary examination, that he privately admitted his guilt, is competent evidence his subsequent trial before the common pleas. Smith v. State, 15 C. C. (N.S.) 3, 24 O. C. D. 526.

It is not an abuse of discretion for a trial judge to keep a jury out for forty urs in an important case and then send them back to their room with an admoni- n as to the importance to all concerned that they should agree upon a verdict. drews v. State, 15 C. C. (N.S.) 241, 23 O. C. D. 564.

Where a plea of not guilty is withdrawn for the purpose of demurrer or the filing a motion, its withdrawal is not absolute, but merely suspends the effect of the a until the questions which have been interposed have been determined, and a termination adverse to the claim of the defendant restores the plea and the issue ich it raised between the state and the defendant, and it is not error in such case proceed with the trial without the entering of a second plea. Andrews v. State, C. C. (N.S.) 241, 23 O. C. D. 564, 57 Bull. 505.

The hearing of a motion for a new trial is not a part of the trial. The esence at the hearing of such motion of one convicted of a crime is not necessary d it is error for the trial judge to refuse to hear and determine same on account the convict's absence. Armstrong v. State, 15 C. C. (N.S.) 368, 24 O. C. D. 384.

When the ground has been properly laid for impeaching a witness it is not ror to permit a stenographer who took his testimony before the grand jury to ate that certain questions were there asked the witness and answers given by him d the stenographer may refresh his memory from his written notes of such timony. John v. State, 16 C. C. (N.S.) 316.

Where defendant relies upon the fact that the first spouse had been absent for re than five years next preceding her second marriage, without being known to be ing, there is no burden upon her to show that she used due diligence to ascertain whereabouts of her first husband, and the court erred in charging that such rden was upon her. Harms v. State, 16 C. C. (N.S.) 443.

Where an indictment alleges that the accused induced a female person under hteen years of age to enter a house of ill-fame for the purpose of prostitution, d described the house as No. 501 Hamilton avenue, in the city of Cleveland, and only proof is that he induced her to enter No. 415 Hamilton avenue, in the city Cleveland, the variance between the allegation and the proof is fatal. Goldberg v. ate, 17 C. C. (N.S.) 101.

Where it is manifest from the record, by the defendant's own testimony, that he s clearly guilty of the offense charged in the indictment, a judgment of conviction ll not be reversed for error in the charge due to an unintentional mistake in the of language by the trial judge, apparent to everybody, jury and all alike, it being tain that a new trial would result only in another conviction. Cole v. State, C. C. (N.S.) 106.

After the accused has begun to serve his sentence, the court can not set aside ch sentence and impose a more severe one. Santo v. State, 17 C. C. (N.S.) 110.

The fact that a charge is more favorable to the accused than it should have been es not justify the reviewing court in reversing a judgment which is rendered upon

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a verdict against such accused; since such error is not prejudicial to such accused. Townsend v. State, 17 C. C. (N.S.) 380, 25 O. C. D. 408.

A proposed juror in a first degree murder case, who, in answer to a question by the prosecuting attorney as to what his mental attitude would be toward a recommendation to mercy, if he should be clearly of the opinion, after hearing the evidence, that the accused was guilty of the crime charged against him, states that under the circumstances described in the question he would not recommend the accused to mercy, may be challenged for cause, but if not so challenged, a verdict of guilty without recommendation to mercy will not be reversed because such juror served in the case. Mangano v. State, 17 C. C. (N.S.) 595.

While it is not proper for the court in overruling a motion for a change of venue to say that the defendant has not shown sufficient interest to be present, such remark is not reversible error if none of the prospective jurors were present. Townsend v. State, 17 C. C. (N.S.) 380, 25 O. C. D. 408.

The examination of jurors on their voir dire affords the best test as to whether or not prejudice exists in the community against the defendant, and where it appears that the opinions as to the guilt of the defendant of those called for examination for jurors are based on newspaper articles, and that the opinions so formed are not fixed but would yield readily to evidence, it is not error to overrule an application for a change of venue. Townsend v. State, 17 C. C. (N.S.) 380, 25 O. C. D. 408.

If a request is made to the court to charge a number of propositions separately and not as a series, the court does not commit error in refusing to give a proposition if part of such proposition is erroneous, although the greater part of such proposition is correct. Walker v. State, 18 C. C. (N.S.) 1.

Where one who has been tried and convicted before a magistrate for violation of the law against the sale of intoxicating liquors, applies to the court of common pleas for leave to file a petition in error to review the proceedings and judgment of the magistrate, and the court to whom the application is made refuses to grant leave to file a petition in error, such refusal is not reviewable on error in the court of appeals. Deniel v. State, 1 O. A. R. 131, 18 C. C. (N.S.) 275, 24 O. C. D. 287.

The police court of a municipal corporation may take judicial notice of its ordinances, but the common pleas and circuit courts may not do so, and by so doing reversible error is committed. Gates v. Cleveland, 18 C. C. (N.S.) 349.

No prejudice results from misstatements as to the crime charged by the prosecuting attorney in his opening statement of the case to the jury in a criminal case, if, after the evidence is all in the trial judge instructs the jury to consider only the evidence admitted and to disregard all statements of the prosecuting attorney with regard to evidence offered, but not admitted. Lieblang v. State, 18 C. C. (N.S.) 179.

General Code § 1548 does not make it mandatory upon a trial judge to provide the defense in a criminal case with an official stenographer, and a judgment of conviction will not be reversed for failure so to do, where it appears there was no official stenographer available at the time, and no claim is made that the verdict is against the weight of the evidence, or that the defendant was not proved guilty beyond a reasonable doubt, or that any manifest injury resulted to the defendant through failure to have a stenographer in attendance. Austin v. State, 2 O. A. R. 16, 18 C. C. (N.S.) 607, 24 O. C. D. 603.

A reviewing court should not set aside the verdict of a jury in a criminal case unless it is manifestly against the weight of the evidence. Andy v. State, 2 O. A. R. 103, 19 C. C. (N.S.) 93, 26 O. C. D. 146.

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If a first offense is punished by fine only, and upon a second offense a judgment f abatement may also be rendered, the fact that the accused would be entitled to a ıry trial if a second offense were charged, does not entitle him to a jury trial here a first offense is charged. Sanders v. State, 1 O. A. R. 306, 20 C. C. (N.S.) 95, 24 O. C. D. 226.

The intent with which an act is done is immaterial, where it is made an offense xpressly prohibited by statute, and in a prosecution of one over eighteen years of ge for having carnal knowledge of a girl under sixteen with consent it is not neces- ıry that criminal intent be either averred or proved. Zent v. State, 3 O. A. R. 473, 1 C. C. (N.S.) 475, 25 O. C. D. 219.

It is not necessary in a prosecution of one over eighteen years of age for having ırnal knowledge of a girl under sixteen years of age with consent, that the defend- nt be shown to have known or to have good reason to believe that the girl was nder sixteen years of age; and failure to show such knowledge is not error. Zent v. tate, 3 O. A. R. 473, 21 C. C. (N.S.) 475, 25 O. C. D. 219.

In a criminal case, where it is plain from the evidence that the jury could not ave reached any conclusion other than that which was reached, a verdict will not e set aside for reprehensible misconduct of the prosecuting attorney. Sisson v. tate, 19 C. C. (N.S.) 99.

It is error to refuse to charge that the nature of the crime of embezzlement such that although money may be received by an agent or servant from time to me as it comes into his hands lawfully, there may be no completed crime of nbezzlement until, having thus received several sums at different times, he finally efuses or is unable to account for the aggregate amount. Shelley v. State, 19 C. C. N.S.) 164 (affirmed by supreme court on grounds stated in this opinion. State v. helley, 85 O. S. 481).

It is error to refuse to charge that one is not guilty of embezzlement who has ot concealed the receipt of money alleged to have been embezzled but, on the con- ary, has claimed in good faith to keep it under some right as against the owner. helley v. State, 19 C. C. (N.S.) 164 (affirmed by supreme court on grounds stated this opinion, State v. Shelley, 85 O. S. 481).

At the trial of one indicted for embezzlement of funds of one for whom he had een appointed guardian, the judgment and orders of a court upon exceptions filed to e accused's inventory and accounts as guardian, are not admissible in evidence. helley v. State, 19 C. C. (N.S.) 164 (affirmed by supreme court on grounds stated this opinion, State v. Shelley, 85 O. S. 481).

The cross-examination of a defendant in a criminal case who offers himself as a itness, as to shady transactions which the questions assume he was connected with, ıch cross-examination being solely for the purpose of testing his credibility, is mited only by the sound discretion of the court, and a judgment will not be eversed for permitting such cross-examination, unless it appears from the record that ıch discretion was abused to the prejudice of the accused. Golner v. State, 19 C. C. N.S.) 571.

It is reversible error to state a proposition of law incorrectly in the charge to he jury by leaving out one material element, notwithstanding the same proposition as correctly stated in an earlier part of the charge. Cromley v. State, 19 C. C. N.S.) 526, 26 O. C. D. 209.

Where in the course of an examination being made by physicians, appointed by court for that purpose, the accused makes admissions as to his physical condition,

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such admissions are admissible in evidence, even though the court had no right to order such examination and the physicians had no right to make it and the accused did not know that he was not obliged to submit to such examination. Jones v. State, 20 C. C. (N.S.) 542.

The fact that the evidence introduced against one charged with being a known gambler was confined to persons of a single class, to-wit, members of the police department, is a matter which affects the weight of the evidence only, and where evidence so proffered was permitted to stand unchallenged, and no evidence was offered by the defendant, a finding of guilty will not be disturbed by a reviewing court. Hirsch v. Cincinnati, 21 C. C. (N.S.) 561 (motion for leave to file a petition in error and to direct the court of appeals to certify its record overruled by the supreme court, 13 O. L. R. 76; petition in error dismissed by supreme court, there being no constitutional question involved, 13 O. L. R. 452).

If after the trial of a criminal cause has commenced, the prisoner absents himself, the trial may continue, under G. C. § 13676, whether the case be one of felony or misdemeanor, though sentence may not be pronounced in the prisoner's absence, except in cases of misdemeanor. Under these circumstances the court committed no error in proceeding with the trial. Lieblang v. State, 21 C. C. (N.S.) 539.

An affidavit of prejudice filed on the day of trial and immediately before its start, is too late, under G. C. § 1687, and may be disregarded by the trial judge. Such action by the court is not error. Lieblang v. State, 21 C. C. (N.S.) 539.

Defects and imperfections in pleading which do not prejudice the substantial rights of the accused on the merits do not invalidate the indictment. Lynch v. State, 23 C. C. (N.S.) 230.

The failure of a court to give a detailed and comprehensive instruction upon a point upon which no additional or further instruction is asked by the party who complains of the charge as given is not reversible error. Murray v. State, 23 C. C. (N.S.) 508.

In the trial of one accused of having committed murder while attempting to perpetrate a robbery, the failure of the court to define an attempt to perpetrate a robbery is not error where no such definition is requested. Murray v. State, 23 C. C. (N.S.) 508.

A plea of self-defense admits the killing by the defendant but seeks to avoid the legal consequences by pleading and showing justification. If a defendant does not admit the killing, but stands on his plea of not guilty and challenges the state to prove beyond a reasonable doubt that the killing was committed by him, an instruction to the effect that there was some evidence that the killing was by the defendant, but he claimed he was justified under the doctrine of self-defense, is highly prejudicial, since it leaves the jury no option but to find that the killing was the act of the defendant, their task being only to determine whether it was in self-defense; and such a charge shifts the burden of the proof and compels the defendant to prove his innocence by a preponderance of the evidence. Goings v. State, 24 C. C. (N.S.) 145.

Entry—Reversal of judgment, and cause remanded for new trial.

(Title.)

This cause came on for hearing upon the petition in error, the transcript and the original papers, and was argued by counsel; on consideration whereof, the court finds that there is error therein apparent upon the record, to the prejudice of the

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intiff in error * in this, to-wit (state error). It is, therefore, considered by the urt that the judgment aforesaid be reversed and held for naught†

It is further ordered that this cause be remanded to (name the court in which, the magistrate before whom, the cause was originally tried), for ‡ a new trial d such further proceedings as may be authorized by law; and that a special ndate (or, a writ of procedendo) be sent to said court (or, magistrate) to carry s judgment into execution.

Entry—Reversal and discharge of defendant.

(Title.)

(Follow first form to the †, and then add:)—and that the said E F, plaintiff error, be discharged.

Entry—Reversal in part.

(Title.)

(Follow first form to the *, and then add:)—in so much of the said judgment (here state the part to be reversed), and as to the same the said judgment is ersed. And the court finding no error in the residue of said proceedings and gment, does, therefore, affirm the same.

Entry—Affirmance of judgment.

(Title.)

This cause came on for hearing upon the petition in error, the transcript and original papers, and was argued by counsel; on consideration whereof, the court ds that there is no error therein apparent upon the record, to the prejudice of plaintiff in error.

It is, therefore, considered by the court that the judgment aforesaid be, and the ne is, hereby affirmed, and that the defendant in error recover of the plaintiff in or its costs herein expended to be taxed. It is further ordered that a special ndate, etc. (concluding as in the first form).

In a capital case, affirming judgment and fixing day for execution.

(Follow the preceding form and continue:)—and the day appointed for the ecution of the said E F having passed, the court appoint the ——— day of ———, —, between the hours of — m. and — m. as the time for carrying out the former tence of the court of common pleas of ——— county, Ohio, in this cause. And is ordered that a warrant issue accordingly.

c. 13756. Shall not be filed in the supreme court except on leave.

A petition in error shall not be filed in the supreme court except on good cause shown, upon motion, and notice to the prosecuting torney and the attorney-general, as in civil cases, or unless such tion is allowed by such court, or, in capital cases, by two judges ereof, and in other cases by one judge thereof. (R. S. § 7361.)

Cited in Steube v. State, 3 C. C. 392.

Under present G. C. §§ 13681 and 13764, leave to file a petition in error must obtained by the prosecuting attorney.

A writ of error in a criminal case requires an allowance, and the better opinion ms to be that the jurisdiction is dependent upon its being allowed; and that, erefore, the allowance can not be waived. Farris v. State, 1 O. S. 188.

There is no statute limiting the time within which proceedings in error in minal cases must be begun, G. C. § 12270 not applying to criminal cases, and a tion by the accused for a leave to file a petition in error twenty-two months after lgment is filed in time. Miller v. State, 73 O. S. 195.

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The time for allowing writs of error in criminal cases is not limited to three years from the rendition of a judgment, as it formerly was in civil cases. Blackburn v. State, 22 O. S. 581; see also, Nickel v. State, 6 C. C. 601, 3 O. C. D. 605.

Under G. C. § 13764, which provides that whenever a court superior to the trial court renders a judgment adverse to the state in a criminal case or proceeding, error may be prosecuted to reverse such judgment in the next higher court by the prosecuting attorney or by the attorney general, it is not necessary that leave of the supreme court should be obtained by the prosecuting attorney or the attorney general to file the petition in error which that section authorized. State v. Gaskins, 87 O. S. 128 (for later report in same case, see State v. Gaskins, 88 O. S. 550).

A petition in error to review a conviction before a mayor for a violation of a municipal ordinance can not be filed except on leave of a common pleas court or a judge thereof. Miller v. Bellefontaine, 2 C. C. 139, 1 O. C. D. 407.

Notice of application for leave to file petition in error.

Supreme Court of Ohio.

E F, Plaintiff in Error,
v.
The State of Ohio, Defendant in Error.
} Notice.

The defendant in error will take notice, that on the ——— day of ———, A. D. 19—, the said E F will make application to the supreme court of Ohio, for leave to file a petition in error in this cause, and will rely upon the following grounds of error, to-wit (state the grounds of error relied on).

G H, Attorney for Plaintiff in Error.

If the application is made to a judge of the supreme court, the notice must state the name of the judge and the place where the application is to be made.

Motion for leave to file a petition in error.

Supreme Court of Ohio.

E F, Plaintiff in Error,
v.
The State of Ohio, Defendant in Error.
} Motion for leave to file a petition in error.

The said plaintiff in error moves the court for leave to file a petition in error in this case on account of the errors set forth in the petition attached to this motion.

G H, Attorney for Plaintiff in Error.

Sec. 13757. Suspension of sentence in criminal cases; when defendant admitted to bail.

Upon filing such petition in error in the supreme court, the execution of sentence, in cases of felony, shall be thereby suspended and in cases of misdemeanor, the court or judge, allowing the motion, shall order such suspension. Proceedings in error in other courts shall not suspend execution of sentence except in capital cases, where such suspension must be for good cause shown, on motion, and on notice to the prosecuting attorney of the proper county, ordered by a majority of the judges of the court of appeals of the county, and in other cases in such court, by one judge thereof, and in cases in the common pleas court by one of the judges of such court. In cases of conviction for felony, except for murder in the first and second

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legree, where sentence is suspended, the judge who presided on the rial of such case, may admit the defendant to bail, conditioned that uch defendant will prosecute his petition in error and surrender imself to the custody of the proper officer of the county in which uch conviction was had, if the judgment against him is not reversed r a new trial ordered. (R. S. § 7362: 85 v. 167; 82 v. 16, 39; S. & C. 82; 103 v. 434.)

Cited, State v. Simmons, 49 O. S. 305; Mick v. State, 72 O. S. 388.

Where a criminal case is pending on error in the circuit court, the supreme ourt has no power under the constitution to hear and determine a motion to susend the execution of sentence. The circuit court has such power. Webster v. tate, 43 O. S. 696.

On the allowance of a writ of error the supreme court has no right to admit o bail one who has been convicted and sentenced to the penitentiary by the court of ommon pleas. State v. Clark, 1 Dec. Rep. 155, 3 W. L. J. 7.

The mere pendency of a petition in error to release the judgment of the court elow is not sufficient ground for an order fixing a bond for suspending execution of judgment. Steube v. State, 3 C. C. 383, 2 O. C. D. 216.

The authority conferred upon a common pleas judge to suspend the exeution of sentence of one convicted of a felony, for such period as will give a reasonble time to file a petition in error, does not authorize the admission to bail of the ne so convicted, pending the hearing on the petition in error. After suspension of entence by the circuit court, the common pleas court may admit the defendant to ail until the expiration of such suspension. State v. Baker, 3 N. P. (N.S.) 622, 6 O. D. 326.

A mayor has no authority to admit to bail after sentence except upon order of he common pleas court granting leave to file a petition in error. Scio v. Hollis, N. P. 281, 10 O. D. 90.

Order suspending sentence in a capital case.

(Title.)

On motion of the plaintiff in error, by his attorney, and notice thereof having een duly given to the prosecuting attorney of ——— county, and for good cause hown, it is this day ordered by a majority of the judges of this court that the xecution of the sentence of the court of common pleas of ——— county, against he said defendant, E F, be suspended for ——— days.

Order suspending sentence in other cases.

(Title.)

On motion of the plaintiff in error herein, it is ordered that execution of the entence of the court below, in this cause, be suspended for ——— days.

(If the case is a misdemeanor, add:)—and the said plaintiff in error having een convicted of a misdemeanor, he is required to enter into a recognizance, accordng to law, in the sum of $———.

ec. 13758. Defendant committed to penitentiary pending decision of petition in error, etc.

In cases of conviction for felony, except for murder in the first deree, where the defendant has been committed to the penitentiary and entence has been or may be suspended, the clerk of the court in hich the entry or order is made suspending such sentence, under the eal of such court, shall forthwith certify it to the warden of the

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penitentiary, who shall cause such defendant to be conveyed to the jail of the county in which he was convicted and committed to the custody of the sheriff thereof, unless admitted to bail, pending the decision of the petition in error or the termination of the suspension of sentence. If the judgment be affirmed or the suspension of sentence terminated, such defendant shall be conveyed by the sheriff to the penitentiary to serve the balance of his term of sentence. The supreme court, in the order allowing the filing of a petition in error, may provide that such defendant shall remain in the custody of the warden of the penitentiary pending the decision of the court on the petition in error. (R. S. § 7362a; 90 v. 363.)

In a criminal case pending on error in the circuit court the supreme court has no power, under the constitution, to hear and determine a motion to suspend the execution of a sentence. The circuit court has such power. Webster v. State, 43 O. S. 696.

Under this section the court granting leave to file a petition in error must also fix the amount of the recognizance and direct before what officer it is to be executed. Scio v. Hollis, 7 N. P. 281, 10 O. D. 99.

Entry—Motion granted and execution of sentence suspended in felony.

(Title.)

This cause coming on for hearing on the motion of the plaintiff in error, to suspend execution of sentence during the pendency of the proceedings in error herein, the court, being fully advised in the premises, † grants the same, and execution of sentence is hereby suspended until the determination of these proceedings in error.

Entry—Motion granted and execution suspended.

(Title.)

(Follow preceding form to end, and then continue:)—upon the plaintiff in error entering into recognizance according to law in the sum of $——, to the approval of (name the clerk of the court or the officer before whom the cause was tried).

Entry—Motion overruled.

(Title.)

(Follow first form to †, and continue:)—overrules the same.

Sec. 13759. No suspension in misdemeanors, unless convict enters into recognizance.

An order of a court or judge suspending execution of sentence, in a case of misdemeanor, shall not take effect until the defendant enters into a recognizance, before the clerk of the court or the officer before whom such case was tried, in a sum to be fixed in such order, conditioned that such defendant will prosecute his petition in error to effect, and surrender himself to the custody of the proper officer of the county in which the conviction was had, if the judgment against him be not reversed or a new trial ordered. (R. S. § 7363; S. & C. 1188.)

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Bond taken by magistrate.

'he State of Ohio,——— county, ss.

Be it remembered, that on the ——— day of ———, A. D. 19—, personally ppeared before me, a justice of the peace for said county (or, mayor of the incororated village of ———), E F and G H, and jointly and severally acknowledge hemselves to owe the State of Ohio the sum of ——— dollars, to be levied on their oods and chattels, lands and tenements, if default be made in the condition followng, to-wit:

Whereas, lately, in a certain action pending before me between the State of hio and the said E F, judgment was rendered against the said E F, and the said F has filed his petition in error in the ——— court of the ——— county, and has btained an order suspending the execution of said judgment during the pendency of uch proceedings in error, now the condition of the above obligation is such † that the said E F will prosecute his petition in error to effect, and will surrender imself to the custody of the sheriff at ——— county (or, of the superintendent and irectors of the workhouse of the city of ———), in case said judgment against the aid E F be not reversed, or a new trial ordered, then this recognizance shall be oid, otherwise it shall be and remain in full force and virtue of law.

E F. [SEAL.]
G H. [SEAL.]

Taken and acknowledged before me, and approved by me, on the day and year bove written. A B, Justice of the Peace,
(or, Mayor of, etc.).

Bond taken by clerk of court.

he State of Ohio,——— county, ss.

Be it remembered, that on the ——— day of ———, A. D. 19—, personally ppeared E F and G H, and jointly and severally acknowledged themselves to owe ne State of Ohio the sum of ——— dollars, to be levied of their goods and chattels, nds and tenements, if default be made in the condition following, to-wit:

Whereas, lately, in a certain action of indictment, pending in the court of ommon pleas of ——— county, between the State of Ohio and the said E F, and udgment was rendered against the said E F, and the said E F has obtained leave o file a petition in error in the Supreme Court of Ohio (or, in the circuit court of ——— county), and an order suspending the execution of said judgment during the endency of said proceedings in error, now the condition of the above obligation is uch (follow the preceding form from the †).

E F. [SEAL.]
G H. [SEAL.]

Taken and ackuowledged before me, and approved by me, on the day and year bove written. Clerk of ——— Court,
——— County.

Sec. 13760. When sentence is reversed and defendant in penitentiary.

When a defendant has been committed to the penitentiary, and the udgment, by virtue of which the commitment was made, is reversed on roceedings in error, under the provisions of this chapter, by which eversal such defendant is entitled to his discharge or to a new trial,

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the clerk of the court reversing such judgment, under the seal thereof, shall forthwith certify it to the warden of the penitentiary. (R. S. § 7364; 66 v. 317, § 203; S. & C. 1188.)

Sec. 13761. When warden shall discharge accused.

The warden, on receipt of such certificate, if a discharge of the defendant is ordered, shall forthwith discharge him from the penitentiary. (R. S. § 7365; 66 v. 318, § 204; S. & C. 1188.)

Sec. 13762. When warden to return accused to county jail.

If a new trial is ordered, the warden shall forthwith cause the defendant to be conveyed to the jail of the county in which he was convicted, and committed to the custody of the sheriff thereof. (R. S. § 7366; 66 v. 318, § 205; S. & C. 1188.)

Sec. 13763. This chapter governs criminal proceedings in probate courts, etc.

The provisions of this title, so far as applicable, shall govern criminal proceedings in probate courts having criminal jurisdiction. If a case arise, not provided for herein, the practice heretofore observed may be followed, if necessary to prevent a failure of justice. (R. S. § 7367; 66 v. 324, §§ 231, 232.)

Criminal procedure, code of—Its object and how it should be construed.—A great advance has been made in the laws relating to crimes, punishments and criminal procedure. The fact is unquestioned that there was a time when felonies, which at common law were few in number, embraced, by parliamentary enactments, more than two hundred offenses; when acts were punishable with death, which, if committed at this day, would not be punishable at all; when one charged with felony was not permitted to have a copy of, or even to examine the indictment, to call witnesses in his defense, or have the assistance of counsel; when no instance could be found in which a jury in a criminal case had failed to render a verdict on the same day it was impaneled; when jurors were fined for refusing to return a verdict of guilty; when the ordinary course was to sentence as soon as a verdict of guilty was rendered, and cause the accused to be executed on the following morning. It is not strange that in such a state of the criminal law, humane judges, *in favoram vitae* would determine cases upon technicalities which at this day would be regarded as frivolous. But all this is changed. Now, the tendency is, on the one hand, to disregard that which is merely formal and technical; on the other, to preserve, in every stage of the case, all matters of substance, and afford the accused a trial as full, fair and impartial as can reasonably be desired, with the presumption of innocence effectual for his protection, until his

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uilt is proved beyond reasonable doubt. *In harmony with this reformation is our ode of criminal procedure, which is to be construed not strictly in all its parts, ut according to its manifest spirit.* Burke v. State, 34 O. S. 79.

Sec. 13764. When state may prosecute error.

Whenever a court, superior to the trial court, renders judgment adverse to the state in a criminal case or proceeding, error may be prosecuted to reverse such judgment in the next higher court by either the prosecuting attorney or attorney-general. If such conviction has been for a violation of a municipal ordinance, such proceedings in error may be brought by the solicitor of the municipality. Like proceedings shall be had in such higher court at the hearing of the petition in error as in the review of other criminal cases. The clerk of the court, rendering the judgment sought to be reversed, on application of the prosecuting attorney, attorney-general or solicitor, shall make a transcript of the docket and journal entries in such case, and transmit it with all bills of exceptions, papers and files in the case to such higher court. (R. S. § 7367a; 98 v. 33.)

Cited in State v. Sappienza, 84 O. S. 63.

As a general rule an application by a prosecuting attorney for leave to file a bill of exceptions to the decisions of the court in a criminal case before the prosecution is ended will be overruled. State v. Dickerson, 73 O. S. 193.

The act of February 28, 1906 (98 O. L. 33), repealing § 7306a, Revised Statutes, and substituting § 13764, General Code, does not require that leave of this court shall be obtained by the prosecuting attorney or the attorney general to file the petition in error which the section authorizes. State v. Gaskins, 87 O. S. 128.

A reviewing court can not consider a complaint by the state that the trial judge erred in taking from the jury the question of a defendant's guilt of the crime of robbery, and the permitting of a verdict to be returned of guilty of pocket-picking, where no cross-petition in error has been filed by the state. Brown v. State, 2 C. C. (N.S.) 409, 15 O. C. D. 130 (motion to file petition in error overruled by supreme court).

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CRIMINAL EVIDENCE.

CCESSORY—

See ACCOMPLICE.

CCOMPLICE—

J and K were indicted at the same term, but separately for the same arson. having been convicted and sentenced to the penitentiary, the state, on the trial K, offered the record of that conviction, and the same was admitted in evidence. *d*, that this was error. Kazer v. State, 5 O. 280.

N being indicted under § 36 of the crimes act of 1835 (1 Curwen, 195), for ing and abetting H to steal a horse, on the trial the prosecutor offered H as a ness; but N objected because H was a codefendant with him on the record, and refore, until his case was disposed of, an incompetent witness against the other endant. But the court held that where a serverance takes place, and the parties separately tried, it is, to all intents and purposes, as if they were charged in arate indictments, and in such case one may testify for or against the other. ides that, the rule never had any application where, as in this case, the parties charged with distinct and different offenses. Noland v. State, 19 O. 131.

It is error in the court to charge the jury that the evidence of an accomplice orroborated by the testimony of another witness. Whether it is corroborated or is a question for the jury. Noland v. State, 19 O. 131.

The evidence of accomplices in crime should be very cautiously received, and uld in all cases be suspiciously scrutinized by a jury. From the fact that the ness is shown to be void of moral principle, so much so that, in a case like this, is considered unsafe for him to be at large in community, and that when his ishment commences he is debarred from testifying in any criminal case, the tate of common sense would appear to be against relying with much confidence his veracity. Noland v. State, 19 O. 131.

The acts and declarations of a conspirator may, after sufficient proof of conracy, be given in evidence to charge his fellow conspirator; but subject always the limitation that the acts and declarations admitted be those only which were de and done during the pendency of the criminal enterprise, and in furtherance the common object. Where the declarations are merely a narrative of a past urrence, they can not be received as evidence of such occurrence. They must be comitant with the principal act, and connected with it, so as to constitute a t of the *res gestae;* for, while engaged in accomplishing the common design, each deemed the agent of all, and his acts and declarations are those of all. Patton State, 6 O. S. 467.

Where two or more persons are proved to have been associated together for an gal purpose, an act or declaration of one of the parties, in furtherance of the mon object, and while engaged in the prosecution of the general design, may

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be given in evidence against his associates. But the declarations of a party, in his own behalf, and detailing what he personally intends to do, but n furtherance of any concerted action with others, are not admissible as evi against an associate in crime, although he and such associate may afterward e in, and be indicted for, the same criminal act to which the declarations admissions related; and although it may also be proved that, before the maki the declarations, the two had jointly arranged to commit the identical act. v. State, 7 O. S. 471.

Where an indictment against two charged one with burning and the with procuring the burning of a building, and the court awards separate trials continues the case as to the principal, such principal becomes a competent wi on the trial of the other party. Approving Noland v. State, 19 O. 131. All State, 10 O. S. 287.

It is error for the court to refuse to permit a witness, after his testi showing his complicity with the defendant in the commission of the crime, asked, on cross-examination, whether he did not expect that his own disc from a further prosecution depended upon the fact of the conviction of th fendant. Allen v. State, 10 O. S. 287.

While it is the duty of the court, in their discretion, to advise the jur to convict of felony, upon the testimony of an accomplice alone, without co ration, there is no rule of law preventing the jury from convicting upo uncorroborated testimony of an accomplice. Allen v. State, 10 O. S. 287.

If two or more persons confederate together to break open a store in the season, and steal the goods therein, and it is agreed between them, in ord facilitate the burglary and lessen the danger of detection, that one of them on the night agreed on, entice the owner to a house a mile distant from the and detain him there, while the others break into the store and remove the g and the confederates perform their respective parts of the agreement, the p who thus enticed the owner away and detained him, was constructively prese the burglary, and may be indicted as a principal offender. Breese v. S 12 O. S. 146.

Proof tending to connect another party with the defendant, as a *part criminis*, will not justify the introduction in evidence of counterfeit bills upon such other party fifty days after the sale charged, though such bills be o same manufacture with those proved to have been sold by the defendant— being no evidence of any intercourse of association between the defendant such other party, during the intervening time. Griffin v. State, 14 O. S. 55.

On the trial of a party charged with crime, the evidence of the declara of a conspirator with the accused, for the commission of such crime, when ma the absence of the accused, is not admissible against him to prove either the of the crime or the existence of the alleged conspiracy, unless they eithe accompany the execution of the common criminal intent as to become a pa the *res gestae*, or in themselves tend to further the execution of the common c nal intent. Clawson v. State, 14 O. S. 234.

How far and under what circumstances a homicide by one of several burglars implicates the others—whether, as a matter of law, his act is their and his purpose their purpose, or whether the guilt of the accomplices de upon the actual assent or dissent to the murder, *quaere*. But where the evi shows a joint burglary, a threat to kill, the firing of the shot, and another, an

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it, it tends to show, and authorizes the jury to find, that there was a common pose to commit the murder. Huling v. State, 17 O. S. 583.

When separate trials are awarded to parties jointly indicted, each is a com-nt witness for the state upon the trial of the other, without being first acquitted convicted, or without a *nolle prosequi* being first entered on the indictment. wn v. State, 18 O. S. 496.

It is not error in the court to instruct the jury that they may find the ndant guilty upon the testimony of such accomplice, corroborated, as to one nore material facts, by other reliable evidence, notwithstanding his infamy and plicity. Brown v. State, 18 O. S. 496.

In case of a joint indictment against two or more persons for burglary, and of them is being separately tried, it is competent for the prosecution to give ence tending to prove that one of the accused, not on trial, as well as the one rial, was present and participating in the commission of the crime; and that shortly before the commission of the crime the two were consorting with other and secretly consulting. But such evidence having been given by the e, it is error in the court to exclude evidence offered by the accused on trial, ing to prove that the other was not and could not have been present and icipating in the crime. Davis v. State, 19 O. S. 217.

On the trial of E, charged, under the act of March 20, 1860, with causing a ding owned by him to be burned, with the intent to defraud the insurer of such ding, H, called as a witness on behalf of the state, having testified that he ed the building in question, and that he was hired to do so by E, the court requested, on behalf of the accused, to instruct the jury that H was guilty of rime, if he burned the building at the instance of E, and was therefore inter-d in procuring the conviction of E (as it would result in his own acquittal, if l for setting said building on fire). *Held*, that this instruction was properly sed. The criminal liability of H for his participation in the transaction, what-it was, was in no way affected by the result of the prosecution against E. the trial of H for such charge, the fact of E's conviction would be wholly aterial; and if it be conceded that it would be material for H to show that he the act at the instance of E, the record in the present case could not be used im as evidence of that fact. Evans v. The State, 24 O. S. 458.

Where two or more persons are charged with the commission of an alleged der, the declarations of those not on trial can not be proved to show their ives or malice on their part toward the deceased, unless such declarations were e during the pendency of the conspiracy, and in furtherance of the common gn. Rufer v. State, 25 O. S. 464.

On the trial of a person indicted under the thirty-sixth section of the crimes (S. & S. 266), for procuring another to commit an offense, it is not competent prove the declarations of the principal offender, made after the completion of offense, for the purpose of showing the guilt of the procurer. Sharpe v. State, O. S. 263.

Where, in a trial upon an indictment, it becomes material to prove upon the of the state that a conspiracy existed between two persons jointly indicted, ence that the same persons were, shortly *prior* to the time of the alleged e, engaged in a conspiracy to commit crimes of a like character, is competent. box v. State, 38 O. S. 581.

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Where, in a trial upon an indictment, it becomes material to prove part of the state that a conspiracy existed between persons jointly indicte that the same persons, shortly after the commission of the offense ch been engaged in a conspiracy to commit crimes of a like character, is Jackson v. State, 38 O. S. 585.

On the trial of one charged with crime, a person jointly indicted was called by the state, and gave evidence tending to prove the guilt of t ant on trial, which evidence was in conflict with former statements of t *Held*, that the defendant may show by cross-examination of such witne had been offered money and property, and immunity from punishment, i testify as he finally testified on behalf of the state; the fact that the offer by one having no authority to make it, going to the weight and not the of the evidence. Tullis v. State, 39 O. S. 200.

If several are associated together to commit a robbery, and one of t all are engaged in the common design, intentionally kills the person th tempting to rob, in furtherance of the common purpose, all are equa though the others had not previously consented to the killing, where s was done in the execution of the common purpose, and was a natural an result of the attempt to rob. Stephens v. State, 42 O. S. 150.

On the trial of one indicted for subornation of perjury, the stateme principal offender, made in the absence of the prisoner, that the latter attempting to hire or had hired him to commit the perjury, are inadm though they tend to prove the principal's guilt of the perjury charge made immediately prior to the commission of the perjury. Dilcher v. S S. 173.

On the trial of one indicted for subornation of perjury, the stateme principal, in the absence of the prisoner, immediately prior to the perju to show the former's disbelief in the facts falsely sworn to, are admissib the state of his mind and belief concerning the subject of his testimony. late to a then existing fact which the state is bound to prove, *i. e.*, the the principal, and are not merely hearsay. Dilcher v. State, 42 O. S. 17

In instructing a jury that the evidence of an accomplice should be received and closely scrutinized, it is not error for the court, in introd caution, to say that the witness "admits her complicity in the crime." State, 48 O. S. 221.

Where one of several defendants jointly indicted for a felony is arately, and the prosecuting witness testifies in chief that the offense mitted by several persons acting together, and testifies to the identity fendant upon trial, it is proper, in cross-examination, for the defense to to the identity of the other participants, and it is error for the court t permit such cross-examination. Morgan v. State, 48 O. S. 371.

On the trial of one of several defendants, jointly indicted, for an declarations of a codefendant, made in the absence of the defendant o furtherance of the common purpose, are admissible when a *prima fac* conspiracy has been made. To authorize the admission of such evidence, averment in the indictment, of the fact of a conspiracy, is not necessary. the conspiracy be one to commit the identical offense charged in the indi even a similar one, it being enough that the offense charged in the indic

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which might have been contemplated as a result of the conspiracy. Goins v. te, 46 O. S. 457.

An agreement to engage in a prize-fight is a conspiracy to commit a crime; and declarations of either party with reference to the common object, or in furrance of the criminal design, while engaged in its prosecution, are competent dence against the other, though the agreement was made by or through backers other representatives of the principals, and the latter were unknown to each er.

Letters written by one of the principals, while in training for the fight, debing what the fight is to be, stating when and where it is to occur, and requestthe presence of his friends and others thereat, are in furtherance of the unlawenterprise, and admissible in evidence against the other. Seville v. State, 49 O. 118.

A person who becomes involved in a fight with one or more antagonists should upon that ground only, be held an aider and abettor of another, who may be pres and incited by the struggle, commits an independent act of violence that causes death of the antagonist, or one of them, if there were more than one. In such e, to constitute the person engaged in the fight an aider or abettor of the homie, it should appear either that there was a prior conspiracy, or that he purposely ted or encouraged the slayer, or did some overt act himself, with an intent to se the death of his antagonist. Woolweaver v. State, 50 O. S. 277.

By § 6815, Revised Statutes, one who prescribes or administers medicines to pregnant woman with intent to produce a criminal miscarriage upon her, is de a principal offender; while by § 6804, Revised Statutes, the woman is subject indictment as an aider and abettor thereof, if she voluntarily and knowingly ticipates in the unlawful act; and in such case, if, upon the trial of a principal nder, she testify on behalf of the state, her evidence should be regarded as that an accomplice. State v. McCoy, 52 O. S. 157.

The declarations of an alleged conspirator cannot be given in evidence to charge fellow until after sufficient proof of the fact of the conspiracy, and then only h as were made during the pendency of the enterprise. Roberts, Ex'x v. Briscoe, . C. 586; 1 O. C. D. 323.

Where two persons are jointly indicted for a felony, and one is on trial, declaras of the other, tending to establish the guilt of the one who is being tried, are competent to be submitted to the jury unless it appears with reasonable certy that such declarations were heard by the one on trial. Ardt v. State, 2 C. C. 1 O. C. D. 337.

Declarations of coconspirators are always competent evidence against any one them, when made in furtherance of the common scheme or design, whether they jointly indicted or not. While it is the general rule that such evidence should be admitted until after the state establishes the conspiracy *prima facie*, yet, if record shows that such evidence was offered before proof of conspiracy, it is error to the prejudice of the accused, if there is sufficient evidence to establish conspiracy after the admission of such declaration. Umbenhauer v. State, 4 C. 378; 2 O. C. D. 606.

To convict a person charged with crime by the act and declaration of another son jointly indicted with such person, a conspiracy must be proven beyond a sonable doubt. Ditzler v. State, 4 C. C. 551; 2 O. C. D. 702.

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On the trial of a person charged with aiding and abetting an owner of p insured against loss or damage by fire, to burn the same with intent to p the insurer (§ 6832, Rev. St.), evidence that the owner made a claim un policy for the loss, and verified and delivered proofs of loss, is competent. v. State, 6 C. C. 332; 3 O. C D. 478.

Statements of the principal after the fire that he had hired the acc burn the property, not made in connection with any efforts of the principal t the insurance, are inadmissible as against the accused. Searles v. State, 332; 3 O. C. D. 478.

Testimony as to conversation by telephone between the prosecuting witn his agent, in the absence and without the knowledge of the defendant, are petent. Limerick v. State, 14 C. C. 207; 7 O. C. D. 664.

When a conspiracy is charged, it is error for the court, in the trial o the alleged conspirators, to admit testimony tending to show the guilt of t (jointly indicted with the defendant on trial), of the crime charged against them, and also conversations had by other persons with such alleged cocon in the absence of the defendant on the trial, without at all connecting hi with, and before there was any proof tending to show any conspiracy betw two to carry out the alleged scheme. Limerick v. State, 14 C. C. 207; 7 664.

While the order in which testimony shall be introduced must of nece largely in discretion of the trial court, yet this should be a legal and pro cretion, and such course should be pursued as should not prejudice the right parties. Evidence of the acts or declarations of persons alleged to be cocons with the defendant on trial cannot properly be received against him, until t is satisfied that, apart from them, there are *prima facie* grounds for beli the existence of the conspiracy. Limerick v. State, 14 C. C. 207; 7 O. C. D.

Where the charge in the indictment is not that the defendant entere conspiracy to commit the crime, but that the crime was in fact committe that the defendant had entered into conspiracy with one or more persons to the crime would not, of itself, justify his conviction under the indictmen must be an actual accusation, and this must be proved by the state before fendant could properly be convicted. Limerick v. State, 14 C. C. 207; 7 664.

A person who encourages or counsels persons about to commit a crim so in order that they may be discovered and punished, is not an accessory be fact, but merely a feigned accomplice, if in so doing he honestly intended t should be discovered and punished. Blackenstoe v. State, 19 C. C. 568; D. 688.

Where there is evidence to show a conspiracy to commit the crime, t of account of an alleged coconspirator and his declarations are admissible dence, although the defendant had no knowledge or control of such books, declarations were made in his absence. But if upon the trial the jury find evidence does not sustain the claim of a conspiracy between such parti book accounts and declarations are incompetent, and can not be considered jury. Davis v. State, 20 C. C. 430; 10 O. C. D. 738.

Where separate trials are awarded to parties jointly indicted, each is petent witness for the state upon the trial of the other; and the fact charged as an accomplice only goes to his credibility as a witness, and

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cessarily render his testimony incredible. Mitchell v. State, 21 C. C. 24; 11 O. D. 446.

To make a case of error in refusing evidence, the competency of which depends on proof of a conspiracy, that fact must appear with reasonable clearness, inasuch as whether or not it has been established, is a matter peculiarly for the trial urt. On that point, under the general rule stated, nothing is shown by the record re, in the prejudice of the defendant below. Donald v. State, 21 C. C. 124; 11 C. D. 483.

Much latitude is left to a trial court in determining the *prima facie* proof cessary to admit evidence of the acts or declarations of a party as a coconspirator th one who is being tried for an alleged crime; and if on that question, there is failure of proof at any material point, the admission of such evidence, otherwise npetent, will not be regarded as error. Price v. Junkin, 4 Watts, 85; Nudd v. rrows, 91 U. S. 426; Donald v. State, 21 C. C. 124; 11 O. C. D. 483.

After evidence of a conspiracy between the defendant and his son to kill the ceased, against objection, the state was allowed to put in the son's declarations the third party, in the father's absence, as follows: "Are you going to town to-y? There is going to be some shooting; if father don't kill a man, I will." At other time: "I would as soon shoot Snyder as I would a rabbit." *Held*, error the statements were not in furtherance of a common purpose of the two to kill Donald v. State, 21 C. C. 124; 11 O. C. D. 483.

A person indicted under § 7019, Revised Statutes (G. C. 13023), for incest ainst his daughter, cannot escape conviction by showing that in committing the ense he also committed the crime of rape, in that the daughter was under the age consent, or was overcome by force and violence.

Testimony of a witness on her examination in chief, in a criminal prosecution ainst her father for incest, that the latter had "sexual intercourse" with her, is t incompetent as a mere conclusion, but is simply permitting witness to testify an act by giving it the ordinary name; and its admission in evidence is not ejudicial, especially when witness was, on cross-examination, required to relate in l all the facts and circumstances of the transaction. Straub v. State, 5 C. C. S. 529; 17 O. C. D. 50.

A girl fourteen years of age, with little conception of the enormity of the ense, who is overcome by her father who is occupying the same bed, and submits incestuous intercourse upon his suggestion, and under his influence, is not such accomplice in crime as will render her testimony incredible or unworthy of belief less corroborated by other witnesses.

There is no rule of law in Ohio preventing a jury from convicting in a felony osecution upon the uncorroborated testimony of an accomplice. Straub v. State, C. C. N. S. 529; 17 O. C. D. 50.

Where two persons are jointly indicted for the same offense, neither the court r the jury engaged in the trial of the second defendant is concluded by the fact at a verdict of not guilty was returned in the case of the first defendant. Studer State, 9 C. C. N. S. 185; 19 O. C. D. 33; affirmed 74 O. S. 519.

The common law rules as to accessories after the fact do not prevail in Ohio. ate v. Lingafelter, 77 O. S. 523.

Where one is indicted and placed on trial for the crime of forgery, and the dence fails to show that the accused committed the forgery, but tends to prove, at after said offense had been committed by another, such accused person per-

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formed acts in the interest of the forger, for the purpose of covering up his and of preventing his detection and punishment, such subsequent acts do stitute aiding and abetting of the forgery as defined in § 6804, Revised (G. C. 12380). State v. Lingafelter, 77 O. S. 523.

ADMISSIONS—

See DECLARATIONS AND ADMISSIONS.

ALIBI—

An attempt by the defendant to prove an alibi in a criminal case is no a of the body of the crime charged; nor does his failure to prove it necessari any presumption that he was present at the time and place when and w crime is alleged to have been committed. Toler v. State, 16 O. S. 583.

Where the evidence tends to prove the commission, by the defendan crime charged in the indictment, at a particular time and place, and the d offers evidence tending to show that at such a time he was at another pl error for the court to charge the jury that testimony tending to show s was not to be considered unless it establishes the fact by a preponderanc dence. The burden of proof was not changed when the defendant undertook an alibi, and if by reason of the evidence in relation to such alibi, the ju entertain reasonable doubt as to the defendant's guilt, he should be although the jury might not be able to find that the alibi was fully proven. v. State, 39 O. S. 215.

The defense claiming that the accused did not leave the house where the night of the homicide, evidence tending to show whether the doors of were locked or otherwise, was competent. Cottell v. State, 12 C. C. 467; D. 472.

Where, in an indictment charging the accused with murder, the t fourth counts charge the murder to have been committed in an attempt t a rape, which counts are nollied and the trial proceeds under the oth containing no such charge, yet testimony tending to show the feelings of th toward the woman in question would not be incompetent as bearing upon t nollied, but competent as a circumstance accounting for his presence at the of the victims at the time of the commission of the crime. Cottell v. State, 467; 5 O. C. D. 472.

Where proof of the presence of the defendant, at the time and pla commission of an offense, is requisite to sustain a conviction, a charge to which in terms or by implication, puts upon the defendant the burden o that he was not present at such time and place, is misleading and erroneo also error, in such case, to charge the jury that an alibi is a defense set defendant, which can only be satisfactorily maintained by proof which impossible that he could have committed the act. Gawn v. State, 13 C 7 O. C. D. 19.

In a prosecution under § 12429, General Code, commenced by indictme court of common pleas of the county in which the parent of defendan where the evidence showed, without contradiction, that during the who time laid in the indictment, the defendant was a non-resident of, and w from, the county in which said indictment was found and prosecution co and that at no time during said period was he within said county, it was

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held by the court of common pleas that it was without jurisdiction of said offense, and a verdict for the defendant was properly directed. State v. Dangler, 74 O. S. 49.

Where, in a criminal prosecution, the evidence of the state tends to prove the commission by the defendant of the crime charged at a particular time and place, and the evidence introduced by the defendant tends to show that at such time he was at another place, it is error for the court to refuse an instruction, requested by defendant's counsel, that: "One of the defenses interposed by the defendant in this case is what is known in law as an alibi. That is, that the defendant was at another place at the time of the commission of the crime. The court instructs you that such a defense is as proper and as legitimate if proved as any other, and all evidence bearing on that point should be carefully considered by the jury. And if in view of all the evidence the jury have any reasonable doubt as to whether the defendant was in some other place when the said crime was committed, you should give the defendant the benefit of the doubt and find him not guilty. The court instructs you further that the defendant need not prove such alibi by a preponderance of the evidence. Neither does he need to establish it beyond a reasonable doubt, but if the evidence as introduced creates in your mind a reasonable doubt of the defendant's guilt, then your verdict should be not guilty, even although you should not be able to find that the alibi was fully proved," and to fail to give any instruction whatever bearing specially upon the subject. Walters v. The State, 39 O. S. 215, approved and followed. Burns v. State, 75 O. S. 407.

BEST EVIDENCE—

Where it is shown that a roll of counterfeit bills has been found in a saddle near where the prisoner had been seen under suspicious circumstances, it is competent for the prosecution to show that he had a motive for concealing them. The fact that he had first been recognized by one who had him whipped for counterfeiting in Vermont, is competent for such purpose, and may be shown by parol, for of the whipping the record of the judgment is not the best evidence. It would not even show the fact, as it does not conclude that such sentence was inflicted. State v. Spring, Tappan, 167.

The defendant was indicted as a "licensed tavern-keeper," under the act of 1831 (3 Chase, 1826, § 12), for keeping a disorderly house. To prove the averment that he was such "licensed" keeper of a tavern, the counsel for the state offered in evidence the entry in the journal of the court, granting to the defendant a license, and offered no other evidence to show that fact. *Held*, that the prosecutor was not bound to produce the license, or to give to the defendant a notice to produce it, and that it was not the duty of the court to arrest that evidence from the jury. Baldwin v. State, 6 O. 15.

The protest of a notary of paper, said to be forged, certifying that the parties to the paper are not to be found in New York, is not competent evidence against one charged with the forgery. Farrington v. State, 10 O. 354.

The letter of the cashier of a bank in New York, to whom paper, said to be forged, had been sent for collection, making suggestions as to the residence of the parties to the paper, is not competent evidence against one charged with the forgery. Farrington v. State, 10 O. 354.

S was indicted under the act of 1835 (1 Curwen, 193, § 31), for knowingly having in his possession and secretly keeping a plate for printing counterfeit bank

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notes of the Bank of Tennessee; and was also indicted under the same act, § 29, for having in his possession counterfeit notes of the Merchants' and Mechanics' Bank, of Wheeling, Virginia, for the purpose of selling the same. On the trials, it was contended that it was necessary to prove that those foreign banks had a legal existence, and that this could only be done by the production of the charters or a copy. But the court held that the fact might be proved by oral testimony. And this was held not to be error. Sasser v. State, 13 O. 453.

In a prosecution under § 22 of the crimes act, for passing counterfeit bills, purporting to have been issued by the bank of another state, the existence of the foreign corporation may be proved by one who, of his own knowledge, is acquainted with the fact, or by one who has seen or handled its notes, currently passed in the community as the notes of such institution, or by general reputation. Reed v. State, 15 O. 217.

If it is possible to do so, the forged instrument should be produced at the trial, but if it be lost, or from other cause it cannot be produced, the prosecutor may show that fact, and then he will be permitted to adduce secondary evidence of the forged instrument. Hart v. State, 20 O. 49.

Where the thing to be proved is a conversation between the accused and another person, the evidence of any person who heard it is primary evidence. It is not necessary to call the persons with whom the conversation was had. Mimms v. State, 16 O. S. 221.

When oral evidence of the contents of an instrument has been received, without objection, it is not error in the court to refuse to exclude such evidence, after the cause has been argued to the jury. Hummel v. State, 17 O. S. 628.

Where an indictment charges the defendant with being the clerk of an incorporated railroad company, and having fraudulently embezzled and converted to his own use the property of the corporation, then under his care by virtue of his employment as such clerk, it is sufficient to establish the corporate existence of the company, by showing that it assumed to be, and notoriously exercised the franchise of a railroad corporation. Calkins v. State, 18 O. S. 366; Burke v. State, 34 O. S. 79.

Where a witness is asked, on cross-examination, whether he has been indicted before or not, the objection that the record is the best evidence, if available at all, must be made at the time, or it cannot be considered. Whether it is available, *quaere*. Wroe v. State, 20 O. S. 460.

On the trial of the issues joined by the plea of not guilty, it is error to admit evidence whose only effect is to show that others believed the accused guilty. Jones v. State, 54 O. S. 1.

Where one was indicted for selling intoxicating liquors at a place within one and one-half miles outside the boundary line of the lands occupied by a National Home for disabled volunteer soldiers, it was not error in the trial court to admit the parol evidence of an officer and one of the managers of the institution to prove the existence of such National Home, its occupation by disabled volunteer soldiers of the United States, and the boundary line of its lands. Driggs v. State, 52 O. S. 37.

A writing, alleged to be a marriage certificate, signed by the minister who solemnized the marriage, but not dated nor recorded nor exemplified in any way, nor entitled to be admitted as an ancient document, is inadmissible in evidence in a criminal prosecution. Whalen v. State, 12 C. C. 585; 5 O. C. D. 488.

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That the deceased was a person of tender years and of weak mind at the time of such seduction, were facts wholly irrelevant to any issue in the case. Rose v. State, 13 C. C. 342; 7 O. C. D. 226.

The fact that the defendant was seen and recognized at a certain time and place, cannot be proved by showing that the party making such recognition shortly thereafter stated to the witness who the person was. Rose v. State, 13 C. C. 342; 7 O. C. D. 226.

Nor is such evidence competent in corroboration of a witness testifying to having made such recognition. Rose v. State, 13 C. C. 342; 7 O. C. D. 226.

Evidence which might affect or influence a court or jury in a given case, is material to the issue therein. Barnes v. State, 15 C. C. 14; 8 O. C. D. 153.

In the prosecution of a proprietor of a junk shop, under § 4413, Revised Statutes, for failing to retain old metal purchased by him, for thirty days, it is competent to show by oral testimony that he made a report on the day of the alleged purchase, where the report is in court and is afterward identified and offered in evidence. Neifeld v. State, 13-23 O. C. C. 246.

Proof of one unlawful sale is sufficient to sustain a conviction under such a charge; and the affidavit need go no further than to aver an unlawful sale, leaving it to be developed by the evidence in what respect the sale was unlawful. Lynch v. State, 12 C. C. N. S. 330; affirmed 81 O. S. 489.

The provision of § 1 of the Rose law, making a certified copy of the result of a county local option election sufficient proof of the holding of such an election, is not exclusive; but any evidence from which the fact may be deducted that such an election has been held is sufficient to sustain a prosecution for violation of the act. Lynch v. State, 12 C. C. N. S. 330; affirmed 81 O. S. 489.

An indictment under § 3140-2, Revised Statutes (see 99 O. L. 230) for failure to provide for an illegitimate child under sixteen years of age need not allege that in a previous proceeding under the bastardy act the defendant had been adjudged to be the reputed father of such child, nor is evidence of such former adjudication necessary to a valid conviction. Ogg v. State, 73 O. S. 59.

In a prosecution under § 3140-2, Revised Statutes, against a father for failure to support his child, he being able to do so, it is not necessary for the state to prove that a demand was made upon the father for the performance of the duty enjoined by the statute. (See 99 O. L. 230.) State v. Teal, 77 O. S. 77.

Testimony as to trailing an alleged criminal by a bloodhound may be permitted to go to the jury as tending to connect him with the crime when there is testimony of some person, who has knowledge, that the dog used has been trained to follow tracks of human beings by scent, and its power of so determining has been tested as to its accuracy in trailing on one or more occasions.

Before evidence of the trailing of an alleged criminal is rendered competent it must be first shown that the dog was put on a trail at a point where the circumstances tend to show that the guilty person had been, or on a track which such circumstances indicate to have been made by him.

Evidence of the acts of bloodhounds in following a trail under conditions stated may be received as cumulative or corroborative evidence against the person toward whom other circumstances point as being guilty of the commission of the crime charged, and when this class of evidence is hedged about with these safeguards of human and other testimony, bloodhound evidence is no more dangerous

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than any other class of circumstantial evidence. Baum v. State, 6 C. C. N. S. 515; 17 O. C. D. 569.

In order to make competent evidence of the conduct of bloodhounds in trailing or following the tracks of one accused of crime, it is necessary that a preliminary foundation be laid therefor, by showing by some one or more having personal knowledge of the facts, that the particular dog so used had been trained and tested in trailing human beings, and by experience had been found reliable in such cases, and that the dog so trained and tested was, in the instance involved, laid on the trail, whether it was visible or invisible, at a point where the circumstances tended to show that the guilty party had been, or upon a track which the circumstances indicated to have been made by him. State v. Dickerson, 77 O. S. 34.

In a trial for burglary, where it was sought to show that packing material was found in the car from which the goods were taken and that such material was scattered from this car to the house of the defendant in which the goods in question were found by the officers, it is competent to ask one of such officers the question, "Do you remember of finding any packing material about the floor of either of these cars?" Carano v. State, 3 C. C. N. S. 629; 14 O. C. D. 93, affirmed 69 O. S. 561.

On the trial of one indicted under § 6816, Revised Statutes (G. C. 12414), for carnally knowing and abusing a female person under sixteen years of age with her consent, confessions or admissions of the accused of acts of sexual intercourse with the prosecutrix more than two years after the time of the alleged commission of the offense for which he is being tried, and after prosecutrix had attained the age of sixteen years, are not competent to be given in evidence against him as tending to prove the crime charged in the indictment. State v. Lawrence, 74 O. S. 38.

Where books and documents are multifarious and voluminous, abstracts and schedules which have been prepared therefrom by an expert accountant may be admitted in evidence, but in such case the books and documents must either be first offered in evidence or be in the custody of the court so that the party against whom such abstracts and schedules are offered may have an opportunity for their examination to verify their correctness. 11 C. C. N. S. 324; 20 O. C. D. 592; affirmed 80 O. S. 722.

A conviction of keeping a place where intoxicating liquors were sold open on Sunday will not be set aside because of failure to prove that the place was not a regular drug store, when the testimony offered was to the effect that the place was a saloon in which intoxicating liquors were sold on other days of the week. Lutkehaus v. Mt. Healthy, 11 C. C. N. S. 536.

BURDEN OF PROOF—

An intention to kill is an essential element of the crime of murder in this state, and must be established beyond a reasonable doubt, to authorize a verdict of murder in the first or second degree. This rule is not changed by reason of the accused contending, and introducing evidence tending to prove that the homicide was accidental; the legal effect of such evidence being simply to controvert an inference of an intent to kill, which may arise from the evidence introduced by the state. Jones v. State, 51 O. S. 331.

In a prosecution for the forgery of a promissory note, when the defendant admits the making of the signature, the burden is not on him to prove that he had

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authority. In such case the burden remains on the state to prove that it was without authority, before a conviction can be had. Romans v. State, 51 O. S. 528.

In such case, it is error for the court to charge the jury, "that the record of the township trustees showing the majority of the votes, cast at an election, held for the purpose of determining whether or not, intoxicating liquor should be sold as a beverage in the township, were against the sale, made a *prima facie* case that the sale was prohibited and that it devolves upon the defendant to show by a preponderance of the evidence that the election was illegal." The burden is upon the state in such case to show beyond a reasonable doubt that the election was held in conformity to the statute. Stick v. State, 13-23 O. C. C. 392.

CHARACTER—

On the trial of B for horse-stealing and grand larceny, the state offered evidence that B hired the horses, buggy, and harness, which he was charged with stealing, from the owners, T & A, of C, for the alleged purpose of driving to A, a distance of thirty miles; and that on leaving he drove to P, a distance of thirty miles, in an opposite direction, and was arrested on the same night. The state then proved by E that on the night before B drove off the horses, B lodged with him; that he left the next morning about daylight, that after he was gone, witness missed twenty-five dollars in gold; that after B was arrested and in jail, he informed witness that the officer had the gold, and that E called on the officer and got his money. The prosecutor stated that he offered the evidence to prove that the defendant stole the gold, and the circumstances connected with that larceny, for the purpose of showing that B, when he hired the horses, did not intend to return with them. To this evidence B objected, but the court overruled the objection. *Held*, that in admitting the testimony the court erred. There was no connection between the two transactions that would enable court or jury to draw any legitimate conclusion as to one larceny from proof of the other. Each case must be tried on its own merits, and be determined by the circumstances connected with it, without reference to the character of the party charged, or the fact that he may previously have committed similar crimes. The prosecutor could not offer evidence as to the character when B had offered none; much less could he offer evidence of particular acts, of which the record gave no notice, and which, therefore, he could not be presumed ready to meet. Barton v. State, 18 O. 221.

On an indictment charging the prisoner with poisoning A in December, 1851, it is error to permit evidence in chief to show that she poisoned B in the month of August previous; for proof of the commission of former crimes is not admissible in proof of the crimes for which defendant is on trial. Nor is such evidence admissible to show the prisoner's knowledge of the deadly quality of the drug. In the use of poisons, like the use of firearms, a *scienter* is presumed, in the absence of contrary proof, unlike cases of passing counterfeit money, where presumption of guilty knowledge does not arise. Farrar v. State, 2 O. S. 54.

Upon the trial of a criminal cause, a defendant may give evidence of his general good character; and such evidence may thereupon be rebutted or disproved by the prosecution; but it is not competent to rebut such evidence of good character by proof of a bad local reputation, limited to a community or neighborhood remote from the defendant's residence, where he has never lived, and where he is not shown to be generally known or acquainted; nor by proof of reports relating to particular facts. Griffin v. State, 14 O. S. 55.

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A defendant in a criminal case, who, by the nature of the issue, is entitled to give evidence of his character for peace and quietness, is not limited to proving what people may have said of him, as to his being or not being a quiet and peaceable man, but is entitled to inquire as to his character from those acquainted with him, and they are authorized to speak from his general peaceable and quiet conduct, and from not having known or heard anything to the contrary. Gandolfo v. State, 11 O. S. 114.

In a criminal case it is error to charge the jury that proof of the prisoner's good character is entitled to less weight where the question is one of great and atrocious criminality than upon accusations of a lower grade. The presumption of innocence which it raises varies with the force of circumstances, but not with the grade of the crime charged. Harrington v. State, 19 O. S. 264.

When the defendant has offered evidence of good character prior and up to the time of the commission of the alleged offense, it is error to permit the state to prove his bad character at a subsequent period. Wroe v. State, 20 O. S. 460.

In a criminal case it is error to instruct the jury that evidence of the defendant's good character is not to be considered by the jury or made available to the defendant, except in doubtful cases, the true and proper rule being to leave the weight and bearing of such evidence to the jury. Stewart v. State, 22 O. S. 477.

Testimony otherwise competent as tending to prove the offense charged in the indictment, is not rendered incompetent by reason of the fact that it also tends to prove a separate and distinct offense. Brown v. State, 26 O. S. 176.

On the trial of a criminal case, it is error to permit the state to prove by cross-examination of a witness called by the defendant, that the accused stands indicted for other offenses. Hamilton v. State, 34 O. S. 82.

The court charged the jury that: "Evidence of good character is to be taken into account by you like all other evidence introduced into the case. If the evidence leaves it doubtful in your mind as to whether the defendant is guilty, the fact that he is a man of good character should turn the scale in his favor; but if the evidence, outside of the evidence as to character, satisfies you beyond a reasonable doubt that the defendant is guilty, you should not acquit him simply because he is a man of good character." *Held*, that the charge was erroneous and calculated to mislead the jury. Donaldson v. State, 10 C. C. 615; 5 O. C. D. 98.

Previous good character, when established, is a circumstance to be considered in connection with the other evidence in the case in determining the guilt or innocence of the accused, but does not raise any presumption whatever. It is a circumstance favorable to the prisoner always to be considered, yet evidence establishing the charge may be so strong and conclusive as to render evidence of this character unavailing. In the practical application of such evidence, it has nothing to do with the overt act of guilt; but it is proper that the jury should consider it when searching for a motive or purpose of deliberation, for it may well be supposed that a man of good character and reputable, and who has led a blameless life, would not be as likely to indulge those passions and exhibit the depravity necessary to commit murder as one habitually engaged in the violation of law. Moran v. State, 11 C. C. 465; 5 O. C. D. 234.

The question as to the weight of the evidence being for the determination of the jury and not of the court, it is not error for the court to refuse an instruction that testimony as to the previous good character of the accused is entitled to great weight. The court would, however, be in the line of judicial duty, as favoring a

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fair trial, if it should give a pertinent instruction embodying the correct rule of law applicable to the evidence. Burns v. State, 75 O. S. 407.

A person on trial for homicide, as a part of his defense, may introduce evidence of competent witnesses, that prior to the date of the crime alleged in the indictment his character as a quiet and peaceable citizen was good, and he is not limited to proving what people may have said about him, as to his being or not being a quiet and peaceable person. Gandolfo v. State, 11 O. S. 114, approved and followed; State v. Dickerson, 77 O. S. 34.

It is not competent for the state, in cross-examination of such witnesses as to the good character of the accused, to prove thereby, that prior to the commission of the alleged crime, they had heard rumors or reports in the community where he resided, that he had committed certain other crimes of various character, and to permit such latitude in cross-examination of such witnesses is error. State v. Dickerson, 77 O. S. 34.

While it is not competent for the state, in making out its case in chief, to introduce evidence of other and prior crimes, for the purpose of supporting the charge made in the indictment, or of reflecting on the character of the accused, yet the commission of a prior crime may be shown for the purpose of furnishing a motive for the commission of the crime charged in the indictment, provided such prior crime is so related to the latter as to have a logical connection therewith, and reasonably to disclose a motive for its commission. State v. Dickerson, 77 O. S. 34.

CIRCUMSTANTIAL EVIDENCE—

Evidence of anything may be either positive or circumstantial. Whichever kind is produced should be of a nature to convince the understanding of a jury. Circumstantial evidence is often the most convincing. It is difficult to fabricate the connected links in a chain of circumstances so as to preserve the semblance of truth. It is more easy where perjury is interested to fabricate positive facts. When the circumstances detailed are real and natural they will correspond with each other; when they are inconsistent with each other or irreconcilable with the admitted and proven facts, there results a plain and almost certain inference that artifice has been resorted to, and that the tale is not true. State v. Turner, W. 20, 28.

In cases of prosecution for crime, on circumstantial evidence, facts may often be proved which, taken abstractly, are no evidence of the commission of the crime. By giving the history of the conduct and sayings of the party accused, at a time when they may have been influenced by the transaction, a source of information is frequently opened to the jury respecting the guilt or innocence of the defendant. Where the circumstances are so remote, or where it is apparent for other reasons that they can cast no light on the subject, the court must reject proof of them, although they consist of the conduct of the party himself. But where they manifest an extraordinary state of mind, or the presence of uncommon ideas in the mind, in such a manner as probably relate to the remembrance or consciousness of guilt; or where they are such a part of the history or conduct of the accused as may connect itself with the subject of the judicial investigation, or become important in connection with other facts and circumstances, they are proper matters of evidence. Where the circumstances are reconcilable upon the theory of the accused's innocence, the jury are bound so to treat them. It is only when the facts and cir-

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cumstances are irreconcilable with his innocence that he can be convicted. Where the defendant was charged with the murder of a woman on the 17th of September, evidence is admissible that the witness went to defendant's house on that day to serve a subpoena in chancery on him; that on the next day, meeting the defendant, the latter said to him: "You were at my house yesterday. I was not at home." To which the witness replied: "No, but I found the woman." That on this remark defendant's countenance changed; he appeared embarrassed, and asked: "What did you say?" and blushed. Moore v. State, 2 O. S. 500.

Where reliance for conviction is upon circumstantial evidence, it is not necessary that a circumstance should be proved beyond a reasonable doubt, unless it is a necessary link in a chain of circumstances, which chain of circumstances is necessary to a conviction. A person may be properly convicted by a large number of circumstances, no one of which alone is established beyond reasonable doubt. Breck et al. v. State, 4 C. C. 161, 2 O. C. D. 477.

It is a general rule, that to warrant a conviction under an indictment for perjury, there should be at least one witness to the corpus delicti, or the falsity of the matter assigned as perjury, and that the testimony of such witness be corroborated, either by another witness, or by circumstantial evidence sufficiently strong to satisfy the jury beyond a reasonable doubt of the guilt of the accused. State v. Courtright, 66 O. S. 35.

Where, in a trial for burglary, it is admitted by the defendant that the stolen goods were shortly after found in his possession, it is not error to refuse to charge as follows: "The evidence for the state in this case, being largely what is known as circumstantial evidence; that is, a chain of facts and circumstances from which you are asked to infer the guilt of the defendant, you should not convict the defendant on such evidence unless these facts and circumstances, taken in connection with all the evidence in the case, are consistent with each other and with the guilt of the defendant, and are wholly inconsistent with the innocence of the defendant on any other reasonable hypothesis." Such request might well have been given, however, if the state had been depending upon circumstances to show that the goods came into the possession of the prisoner shortly after they were stolen. Garano v. State, 3 C. C. (N.S.) 629, 14 O. C. D. 93 (affirmed, 69 O. S. 561).

It is better to err on the side of permitting testimony to be introduced than of excluding it, and in a case involving circumstantial evidence, where some latitude in the matter of evidence is necessary, the judgment will not be reversed because evidence was admitted which was unnecessary but not prejudicial. Studer v. State, 9 C. C. (N.S.) 185, 19 O. C. D. 33 (affirmed, 74 O. S. 519).

Circumstantial evidence may be sufficient to lay a proper foundation whereby one writing is so authenticated as to authorize the comparison therewith of another writing to show identity or diversity of authorship. Lieblang v. State, 18 C. C. (N.S.) 179.

Where reliance for conviction is placed on circumstantial evidence, the jury should be instructed that the facts and circumstances upon which the theory of guilt is based should be shown beyond a reasonable doubt, and when taken together must be so convincing as to be irreconcilable with the claim of innocence and admit of no other hypothesis than the guilt of the accused. Carter v. State, 4 O. A. R. 193, 22 C. C. (N.S.) 154.

CONFEDERATE—

See ACCOMPLICE.

CONFESSION—

See DECLARATIONS AND ADMISSIONS.

No confession can be received in evidence in a criminal case unless it was voluntary. A confession induced by hope or fear, excited in the mind of the prisoner by the representations or threats of any one, is not to be considered as voluntary. The question in every case, where a confession has followed representations or threats, is, was it produced by them? Spears v. State, 2 O. S. 583.

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The question of the admissibility of a confession is to be decided by the judge, if proof of the confession, when offered, is objected to. In deciding it he is to have regard to the following rule: If the representations or threats were made by or in the presence of a person having authority or control over the prosecution or the accused, it is to be presumed that the confession was produced by such representations or threats, unless it appear that their influence was totally done away before the confession was made. If, on the other hand, the representations or threats were made by a person having no such authority or control, and not in such presence, it is not necessarily to be presumed that they induced the confession. In the latter case, the judge is to determine how the confession was produced, by looking at the circumstances; among which are the strength or weakness of the prisoner's intellect, his knowledge or ignorance. If satisfied, however, that the confession was produced by the representations or threats, the court cannot receive it in evidence, because the prisoner has sufficient mind or knowledge to detect the groundlessness of the representations or threats; for the strongest mind is liable to be unhinged, and the question is not what the prisoner ought to have believed, but what he did believe. Spears v. State, 2 O. S. 583.

M was indicted under the act of 1824 (2 Chase, 1332, § 26), which provided that if any person should conceal a horse-thief, knowing him to be such, he should, on conviction, be imprisoned in the penitentiary. The indictment stated that M concealed D, knowing him to be a horse-thief. In order to prove the allegation that D had stolen the horse, the court permitted the confession of D, made in the presence of M, to be offered in evidence. And this was held to be error. It would have been competent to prove *scienter* on the part of M; but to prove the fact of the stealing by D, his confessions are only evidence against himself, not against others, he neither being a confederate nor a party to the record. Morrison v. State, 5 O. S. 438.

Testimony of the confession of the accused in a criminal prosecution is not incompetent, because the confession is made under advice, that if he was guilty the confession could not put him in any worse condition, and that he had better tell the truth at all times. Fouts v. State, 8 O. S. 98.

In order to exclude evidence of confessions by the defendant in a criminal case, it is not enough to show that they were made to an officer having him in custody, and were induced by a false assurance that an accomplice had given information of the crime, if it also appears that nothing was said or done calculated to induce a hope of advantage from confession or fear of harm from its refusal. Price v. State, 18 O. S. 418.

Although extrajudicial confessions alone are not sufficient to prove the body of the crime in cases of homicide, they may be taken and used for that purpose in connection with other evidence. Blackburn v. State, 23 O. S. 146; Hotelling v. State, 3 C. C. 630; 2 O. C. D. 366.

Where statements of a prisoner are given in evidence against him, the exculpatory parts thereof, as well as those which import guilt, are to be received as evidence, and it is the province of the jury, in the light of all the evidence in the case, to decide upon the truth or falsehood of such exculpatory parts; and it is not error in the court so to instruct the jury, and to refuse to instruct them that they have no right to reject or disregard such exculpatory parts, unless there is some other evidence in the case showing them to be false, or unless they are so unreason-

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able or absurd as to be, in the opinion of the jury, unworthy of credence. Blackburn v. State, 23 O. S. 146.

Where, on a criminal trial, a witness is offered by the state to prove a confession made by the defendant, to the admission of which testimony the defendant objects, on the ground that the confession was not voluntary, it is the right of the defendant to inquire of the witness and prove his objection before the confession is given in evidence; and it is error, for the court, in such case, to refuse him leave to make such examination until after the examination in chief has been concluded, and the confession given to the jury. A judgment in such a case, however, will not be reversed for refusing the defendant leave to show, by preliminary proof, that the confession was obtained by improper inducements, unless the facts constituting the alleged inducements, as proposed to be proved, be set out in the record. Rufer v. State, 25 O. S. 464.

The burden of showing that a confession of guilt was obtained by improper inducements rests with the defendant. Rufer v. State, 25 O. S. 464.

Where two person charged with a larceny, having the stolen property in their possession, were taken into custody by a public officer, the declarations of one of them, assuming to speak for and implicating both, made to the officer in the presence and hearing of the other person charged, who remained silent, are competent evidence for the state on the separate trial of the latter. Murphy v. State, 36 O. S. 628.

Where evidence of a confession is excluded because induced by promises made by an officer having custody of the prisoner, but the prisoner, on a subsequent day, voluntarily goes on the stand and is sworn and examined as a witness in his own behalf, under the statute, on his examination before a magistrate on such charge, and he is cautioned by the magistrate, before testifying, that he need not say anything to criminate himself, and that what he may say may be used against him, a confession made in such testimony may be proved by the state on the subsequent trial of such person charged with the crime. Jackson v. State, 39 O. S. 37.

Where, on the trial of a criminal cause, a confession of the defendant is offered in evidence against him, and he objects to its admission on the ground that he had been induced to make it by threats or promises, and that, therefore, it was involuntary, it becomes the duty of the judge to determine this question. (Spear v. The State, 2 O. S. 583.) And upon the preliminary inquiry had before the judge to determine this question, the defendant may introduce pertinent evidence, in addition to that which results from the preliminary examination and cross-examination of the witness, produced to testify to the confession. Whether such preliminary inquiry shall be conducted in the presence and hearing of the jury, or not, rests in the sound discretion of the trial judge. Lefevre v. State, 50 O. S. 584.

Where a party is indicted for the forgery of a note, evidence that the defendant released a judgment he had taken on the note, without consideration, after being charged with the forgery, is competent on the question of his guilt. Burdge v. State, 53 O. S. 512.

Where confessions of the defendant are offered in evidence on a criminal prosecution, and it is claimed that they were not voluntary, the preliminary proof as to whether they were obtained by the influence of hope or fear, may, if the evidence is conflicting, be submitted by the court to the jury, under instructions to disregard the evidence, if satisfied that the confessions were involuntary. Burdge v. State, 53 O. S. 512.

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While it is the law, when the confessions or admissions of a defendant in a criminal case are offered in evidence against him, that all that he said at the same time should be taken and be considered by the jury, and should have its just weight, it does not follow that all of it is entitled to equal credit. For good reasons, one part of it may be received as true, and another part rejected as false. Schneider v. State, 2 C. C. 420; 1 O. C. D. 565.

A confession of crime is not excluded as evidence because it was made to a police officer, or to a coroner engaged in an inquest over the deceased victim, nor because the accused is told "he had better tell the truth," nor because it is accompanied with emotion or distress, nor because accused is with his own consent placed under oath by the coroner, being cautioned that he need make no statement tending to injure or criminate himself. State v. Leuth, 5 C. C. 94; 3 O. C. D. 48.

Prior oral confessions are not merged in the confession reduced to writing, and are also admissible. State v. Leuth, 5 C. C. 94; 3 O. C. D. 48.

A confession made before the coroner was not a judicial confession, and it was necessary that there should be other proof of the *corpus delicti;* but it is not necessary that the agency of the accused should be proved by other evidence which alone would prove the guilt of the accused beyond a reasonable doubt. State v. Leuth, 5 C. C. 94;; 3 O. C. D. 48.

Where the defendant was indicted and convicted under a count for murder in the attempt to perpetrate a rape, there are not two *corpora delicti*, but only one *corpus delicti*—the murder—requiring proof outside the confession. State v. Leuth, 5 C. C. 94; 3 O. C. D. 48.

Where an agent is sent by the prosecuting attorney to a person whom he contemplates causing to be indicted for a crime, for the purpose of obtaining admissions of such person as to his part in the commission of the crime, and as to who his accomplices were, and such agent goes to the person and states to him that he has been sent by the prosecuting attorney of the county to find out from him who were concerned in the commission of the crime, and that it would be for his interest and would save him a heavy fine if he would "own up who the parties were," admissions thus obtained are not competent against such person on his trial under an indictment for said offense shortly thereafter returned against him, unless it be first made to appear affirmatively that such representations had no influence in inducing the accused to make such alleged admissions. But where expressions of the accused, obtained as above stated, have been by the trial court allowed to be given in evidence over the objections of the accused, a reviewing court may determine whether or not such ruling resulted prejudicially to him. Searles v. State, 6 C. C 331;; 3 O. C. D. 478.

Where, after the alleged commission of a criminal act by the defendant on trial, it is shown that statements in regard thereto were made to him by another person, which, if true, tended to show his guilt, and which probably he heard, and which naturally would call for a denial or explanation from him, if untrue, and he remained silent, such evidence is competent to go to the jury as tending to show an admission by him of the truth of the statement so made to him. Haberty v. State, 8 C. C. 262; 4 O. C. D. 462.

In criminal cases, it is competent for the state to prove that soon after the commission or the discovery of the crime with which he is charged, the defendant fled from the place where it was committed, or to prove other acts or statements by him,

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which he probably would not have done or made if innocent. All these are somewhat in the nature of admissions or confessions, and are therefore relevant to the issue. Grillo v. State, 9 C. C. 394, 6 O. C. D. 90.

A statement or expression alleged to have been made by the accused at a time when several persons were present, but testified to as having been made only by one of those present, while others did not hear it, is competent, the weight of such testimony being left to the jury. Moran v. State, 11 C. C. 464, 5 O. C. D. 234.

When a prisoner confesses to a larceny on the representation that it would be better for him and might prevent a prosecution, and shortly afterward repeats the confession before a magistrate without further solicitation, both confessions are to be rejected, the second being caused by the representation as much as the first. Hamilton Supreme Court, 1844. Nichols v. State, 1 W. L. J. 394.

The testimony of the magistrate, before whom the accused was brought for his preliminary examination, that he privately admitted his guilt, is competent evidence at his subsequent trial before the common pleas. A letter written by the accused to the prosecuting witness is not competent evidence against him, but where he failed to take the stand and deny its authenticity and his guilt was established beyond a doubt by competent testimony and his own admission, the judgment finding him guilty will not be reversed. Smith v. State, 15 C. C. (N.S.) 222.

A conversation between a jail prisoner and an acquaintance, which was overheard by the sheriff who had concealed himself for that purpose and during which the prisoner made certain inculpatory statements, is admissible in evidence at his trial. Morrow v. State, 1 O. A. R. 95, 15 C. C. (N.S.) 561, 24 O. C. D. 140.

Statements made by the accused in Italian in answer to questions put to him in the same language by police officers, after his arrest, may be given to the jury in English by said officers, their ability to understand and translate Italian correctly being first inquired into and put before the jury. Riolo v. State, 19 C. C. (N.S.) 248.

CONSPIRATORS—

Declarations and acts of—See ACCOMPLICE.

CONVERSATION—

An agreement to do anything, or go anywhere, is a fact; and the conversation by which that agreement is made, is the legitimate evidence of that fact, and does not, in any way, come under the head of hearsay evidence. Stewart v. State, 19 O. 302.

Where the thing to be proved is a conversation between the accused and another person, the evidence of any person who heard it is primary evidence. It is not necessary to call the person with whom the conversation was had. Mimms v. State, 16 O. S. 221.

Where there is proof of a conspiracy between the defendant and S to burn a building, the testimony of P to the effect that in furtherance of the conspiracy he was employed by S to do the act, is competent as a part of the res gestae, even if it involves a statement of S to P implicating the defendant.

The proof required to establish a conspiracy for such a purpose is not proof beyond a reasonable doubt, but such proof as fairly raises a presumption or inference of a conspiracy. Hutchinson v. State, 8 C. C. (N.S.) 313, 18 O. C. D. 595 (affirmed, 51 W. L. B. 56).

CORPORATIONS—

Corporate character may be proved by reputation, and it is only necessary to show a corporation de facto. Calkins v. State, 18 O. S. 336; Burke v. State, 34 O. S. 79.

DECLARATIONS AND ADMISSIONS—

Where the defendant was charged with a homicide by strangulation, evidence was properly received that a few days after killing, and before the body of the deceased had been discovered, the defendant and other persons were in the grocery, when a quarrel occurred between some of the persons present, and that afterward, on the same day, the defendant remarked that "he could have rid the grocery very easily; that he could kill a man by throwing him on the ground, jamming his knees upon him, and knocking the breath out of him, then grasping him by the throat, and his breath would never return." This evidence could not be received

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as a confession or admission, for it admits nothing connected with the homicide; nor could it be admitted on the ground that, by his own admission, the party was disposed to strangle persons, from which to draw an inference that he had committed the strangling with which he was charged. It was admissible, however, as a part of his conduct, showing the working of his mind. Whether it was caused by the anxiety of the mind to disburden itself, or was a mere casual remark, not in any way connected with the homicide, was for the jury to determine, that it might be produced by thought of the homicide, and consciousness of guilt in it, was sufficient to admit it as evidence. Moore v. State, 2 O. S. 500.

Where, on a trial for murder, it is shown that property, in the possession of the deceased shortly before the murder, was soon thereafter found concealed on the premises of a third person, about that time in company with the defendant, it is competent for the state to prove the acts and declarations of such third person accompanying the discovery of the property, as a circumstance for the consideration of the jury, in connection with other proof, in determining whether he was made such custodian by the defendant. Mimms v. State, 16 O. S. 221.

In a prosecution for rape, evidence that the defendant's brother made offers to compound the crime, is not competent on the part of the state, unless in connection with evidence of authority to make the offer, or of some knowledge thereof, by the defendant. Pratt v. State, 19 O. S. 277.

It is not competent for a defendant, on trial for murder, to prove declarations made by himself, immediately after the homicide, in regard to the fact of the homicide and the circumstances attending it. Such declarations form no part of the *res gestae*, but are simply a narrative made by the defendant in relation to a past transaction. So, *held*, where parties in a wagon about ten rods from the scene saw the fatal shot fired, and the accused immediately came toward them and made the declaration offered, the fact that the state did not object to that part of the declarations of the defendant proved by him, that showed "that he had shot a man, and wanted to give himself up," does not furnish him any ground of complaint, or right to the admission in evidence of the other declarations made by him in the same conversation. *Semble, per curiam*, that the proof of this part of the declaration might have been withdrawn by the court from the jury if the prisoner had asked it. Forrest v. State, 21 O. S. 641; Reed v. State, 15 O. 217; Sasser v. State, 13 O. 453.

In a criminal prosecution, where the state offers in evidence against the accused a part of a declaration or conversation, the defendant is entitled to have the whole of such declaration or conversation given to the jury. But there is no rule of law which requires the jury to reconcile the whole, if possible, with the fact of innocence. The whole declaration or conversation, and each part thereof, as well as that which tends in his favor as against him, is entitled only to such weight as is fairly due to it in the judgment of the jury. Morehead v. State, 34 O. S. 212.

The trial court did not err in refusing to charge, as requested by the counsel for defendant, that, "no matter how heartless or atrocious the conduct and language of the defendant may have been after the killing, the jury are bound to look *only* to what occurred *before or at the* time of the killing, in deciding as to the *guilt* or the degree of guilt of the defendant." Blythe v. State, 4 C. C. 435; 2 O. C. D. 636.

Letters written by the accused addressed to his wife, properly in the possession of a third person, who produces them with nothing to show they had ever been

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delivered to the wife, and the only portion prejudicial to the accused being addressed to the daughter, is properly admitted in evidence on behalf of the state. Lowther v. State, 4 C. C. 522; 2 O. C. D. 685.

Where evidence has been introduced tending to establish that an instrument purporting to be a last will and testament was falsely made and fraudulently uttered with intent to obtain control of the property appearing to be devised thereby, anything said or done by either of the parties to the fraudulent transaction, whether before or after the probate of the forged instrument, in furtherance of the common purpose to defraud, affects them all, and is admissible against either. Corbett v. State, 5 C. C. 156; 3 O. C. D. 79.

Upon the trial on an indictment for criminal libel, published in a newspaper printed and issued September 6, 1889, evidence was given by the state tending to show that the said newspaper was owned by a corporation, and that the defendant had been elected its president in July, 1889, and from that time had some oversight of its management, and the evidence tended to show that there was no change in his relations to the paper or in the part he had in its practical management or control from the time of his said election till the time of said trial. *Held*, that the evidence by the state of admissions by the defendant, tending to show his connection with the practical management of the paper at times subsequent to September 6, 1889, the day of the publication in said paper of said alleged libel, was properly admitted. Boyle v. State, 6 C. C. 163; 3 O. C. D. 397.

If, after the commission of an offense, threats are made by the defendant against the prosecuting attorney of the county, evidence of such alleged threats is not admissible, unless it appears that they were made under such circumstances and are of such character as to manifest a consciousness of guilt. Gawn v. State, 13 C. C. 116; 7 O. C. D. 19.

A conversation had with the defendant while in jail awaiting his trial, whereby certain prejudicial statements made by others are communicated to him, can not be given in evidence against him, in the absence of any admission of or acquiescence in the truth of such statements by him, and in the absence also on his part of any conduct or demeanor indicative of guilt in connection with such communication or as a result thereof. Rose v. State, 13 C. C. 342; 7 O. C. D. 226.

Where the only effect of the proof of such conversation is to show that a person not competent to be a witness had in fact made such prejudicial statements, its admission is error. Rose v. State, 13 C. C. 342; 7 O. C. D. 226.

Testimony as to a conversation by telephone between the prosecuting witness and his agent, in the absence and without the knowledge of the defendant is incompetent. Limerick v. State, 14 C. C. 207; 7 O. C. D. 664.

The defendant and his son being jointly indicted for murder by shooting, on the trial of the former, evidence of the son's statements, made at his home soon after the killing occurred, tending to show who fired the fatal shot, was offered by him and refused. *Held*, no error, as what was said did not appear to be part of the *res gestae*. Donald v. State, 21 C. C. 124; 11 O. C. D. 483.

As showing a persons' state of mind when killing another with whom he was in conflict, it is not competent to prove the acts or declarations of a third party at enmity with him, in no wise connected with the homicide, notwithstanding they manifest most vicious feeling, and are by one who some times prior thereto had joined in a violent assault upon him. Donald v. State, 21 C. C. 124; 11 O. C. D. 483.

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Where the prosecuting witness, in a proceeding for violation of § 4413, Revised Statutes, requiring the proprietors of junk shops to keep old metal thirty days, being asked, "State what, if any, further examination you made at that time of the terms," made in the daily report of such proprietors, answers: "I went over to get a better description of the wire and Mr. N—— told me he had disposed of it," the answer, while not responsive to the question except by inference that the witness did not examine the metal because it was not there, is competent testimony as an admission of the defendant that he had disposed of the metal at that time, and where opportunity was afforded for cross-examination of the witness, thereon, judgment will not be reversed, especially since it was a matter discretionary with the trial court as to whether such answer should stand or not. Neifeld v. State, 13-23 O. C. C. 246.

The phrase *corpus delicti*, as used in criminal law, means the substance of the crime; and on a trial under an indictment for murder, proof of the manner and means in and by which the crime was consummated, does not relate to the *corpus delicti*, but is proof relating solely and directly to the accused's guilty agency in the crime. State v. Knapp, 70 O. S. 380.

In such case, when the proof of the death is direct and positive, if the circumstances shown are of such force when taken together as to leave no room for doubt that the deceased was murdered, any extra-judicial confession by the prisoner, if otherwise competent, may be admitted in evidence for the purpose of establishing his connection with the crime. State v. Knapp, 70 O. S. 380.

If the facts extrinsically proved by the state corroborate the confession, then full, direct and positive evidence of the *corpus delicti* is not indispensable to admit the confession in evidence; and if such extrinsic corroborative facts, when considered with the confession, persuade the jury beyond a reasonable doubt of the prisoner's guilt as charged, such evidence will support a verdict of guilty. Blackburn v. State, 23 Ohio St. 146, approved and followed. State v. Knapp, 70 O. S. 380.

Where the prisoner has made a written confession, admitting that he has perpetrated the crime charged in the indictment and other crimes, and the whole of the confession is offered by the state and is objected to on the part of the defendant, it is not error to allow the whole confession to go to the jury when the court at the time instructs the jury that it is admitted only to prove the killing of the person named in the indictment, and that they should disregard any portion of the confession which does not relate to such killing; and further, that they should not permit the statements in the confession to prejudice them against the defendant for the reason that they were only trying him on the charge of killing alleged in the indictment. State v. Knapp, 70 O. S. 380.

Where the accused has made a written confession, under oath in which he admits the killing charged in the indictment against him and the confession contains admissions of other murders, the action of the court in permitting the jury to have the confessions with them in their room while considering upon their verdict is not prejudicial error. State v. Knapp, 70 O. S. 380.

Where a person conducts a private interview with one who afterwards is called and examined as a witness before the grand jury, which found an indictment against the defendant concerning some matters disclosed in said interview, which interview was stenographically taken, written out and subsequently delivered to the prosecuting attorney for his use, and on the trial the person interviewed is called, and testified for the state in support of the indictment, it is error for the court, on

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request of defendant, to order the prosecuting attorney to deliver the transcript of said interview to defendant or his counsel, or to order the prosecuting attorney to allow either of them an inspection of the same. State v. Rhoads, 81 O. S. 397.

A person charged with crime is not entitled, before or at the time of trial, to the minutes of the evidence taken before the grand jury, on which the indictment was found against him, nor to an inspection of a transcript of such evidence, and it is error for the court to order the prosecuting attorney to deliver said minutes, or a transcript of said evidence so taken, to the defendant or his counsel, or to order the prosecutiing attorney to permit either of them to make an inspection thereof. State v. Rhoads, 81 O. S. 397.

A confession is voluntary, and is competent evidence against the person making it where it appears that no threats or promises were used in obtaining it, and that before the making of the confession the person to whom it was made, who was not an officer, informed the accused that he had no power to grant him immunity from punishment, but that if he wished he could speak. Wade v. State, 2 C. C. N. S. 189; 15 O. C. D. 279. Affirmed, 70 O. S. 463.

Where a man charged with murder voluntarily goes before the grand jury and makes a statement of what he knows about the case and afterwards, during the trial at a preliminary examination had in the absence of the jury to determine the circumstances under which such statement was made and whether it was voluntary, testifies that his statement before the grand jury was true, and it was shown had been made with the knowledge, consent and under the advice of his counsel, evidence of his statements made before the grand jury is competent evidence against him upon his trial. Wade v. State, 2 C. C. N. S. 189; 15 O. C. D. 279. Affirmed, 70 O. S. 463.

Where a person suspected of crime is taken to a private office and questioned for two days and nights regarding circumstances surrounding the crime, and is kept under restraint until released by *habeas corpus*, and is repeatedly told that if would tell the truth he would be allowed to go, his interrogators assuming to be the final arbiters of what was the truth, it is evident that his statements were influenced by fear of further restraint or the hope of regaining his liberty, and such statements can not be regarded as voluntary.

The claim that the statements made by an accused person under such circumstances were not confessions, but were admissions, does not make them competent evidence aginst him where they constitute conclusive evidence with reference to the crime charged, and to receive such statements as evidence constitutes prejudicial error. Kohn v. State, 12 C. C. N. S. 197.

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A verdict in a homicide case will not be set aside and a new trial granted on the ground that newly discovered evidence shows that a person who had been in the penitentiary was seen in the neighborhood at about the time the crime was committed, where there is no evidence that such person was implicated in or connected with the crime or had any knowledge of it. Wade v. State, 2 C. C. (N.S.) 189, 15 O. C. D. 279 (affirmed, 70 O. S. 463).

Declarations made by a person shortly after an assault in which she received injuries which caused her death are not competent as dying declarations upon the trial of her assailants, where it does not appear that at the time of making such declarations she knew or believed that she was about to die. Wade v. State, 2 C. C. (N.S.) 189, 15 O. C. D. 279 (affirmed, 70 O. S. 463).

Declarations made by the victim of a homicide some time after the assault which caused her death, at a house sixty rods distant from the scene of the crime, narrating certain facts in regard to the assault, are not part of the res gestae, and are not competent evidence upon the trial of her assailants. Wade v. State, 2 C. C. (N.S.) 189, 15 O. C. D. 279 (affirmed, 70 O. S. 463).

Statements of third persons to the accused, charging him with crime, and his conduct or replies in response thereto are admissible in evidence against the accused. The value of such evidence depends upon the circumstances of the case, and it should be received and examined with great caution. ——— v. State, 5 C. C. (N.S.) 200, 16 O. C. D. 723.

Where inadmissible evidence has been admitted in behalf of one party, without objection, similar evidence may be admitted to rebut or explain it. ——— v. State, 5 C. C. (N.S.) 200, 16 O. C. D. 723.

Testimony by the accused before the grand jury that he was not guilty, but knew how the murder was committed, was properly admitted at the trial, together with other incriminating statements and admissions on his part showing guilty knowledge. Williams v. State, 11 C. C. (N.S.) 4, 20 O. C. D. 342 (affirmed, 53 W. L. B. 28).

The exclamation of a boy four years of age that "the bums killed pa with a broomstick," which was made from ten to thirty seconds after a fatal assault upon his father, made in the boy's presence, is competent evidence to go to the jury as explanatory and illustrative of the manner and meaans by which the father was assaulted. The utterance of the boy under such circumstances, made at the earliest opportunity to make an outcry in the presence and hearing of others, was the spontaneous and impulsive language of the situation, free from any subterfuge, artifice or motive to fabricate. Its weight, however, is purely a question for the jury. The doctrine of res gestae, as applied to exclamations, should have its limits determined, not by the strict meaning of the word "contemporaneous," but rather by the casual, logical or psychological relation of such exclamations with the primary facts in controversy. This doctrine applies equally to participants, bystanders and persons incompetent to be witnesses. State v. Lasecki, 90 O. S. 10.

Where in the course of an examination being made by physicians, appointed by a court for that purpose, the accused makes admissions as to his physical condition, such admissions are admissible in evidence, even though the court had no right to order such examination and the physicians had no right to make it and the accused did not know that he was not obliged to submit to such examination. Jones v. State, 20 C. C. (N.S.) 542.

DELIRIUM TREMENS—

See INSANITY.

DRUNKENNESS—

See INTOXICATION.

DYING DECLARATIONS—

It is not error to allow a witness to state the substance of competent dying declarations, although he may not be able to give the precise words, and in leaving the credit of the narration and the weight of the evidence to the jury. Montgomery v. State, 11 O. 424.

On the trial of M for manslaughter in killing H, the prosecutor proved that H, just before his death, and while in extremis, said that the statement he has just made, and also what he had sworn to a few days before, on the trial of a complaint against M for an assault and battery growing out of the quarrel in which the deceased received the mortal injury, "was God's truth, and that the whole of the

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statement was true." *Held*, that the deceased, by alluding to both statements at the time of the dying declaration, and by reaffirming them, made them as much his dying declarations as if he had then repeated them at length. Montgomery v. State, 11 O. 424.

It is essential to the admissibility of a dying declaration as evidence, that it should be made to appear to the court by the preliminary evidence, not only that they were made *in articulo mortis*, but also made under a sense of impending death, which excluded from the mind of the dying person all hopes or expectation of recovery. Robbins v. State, 8 O. S. 131.

Evidence of dying declarations is not excluded by the constitutional provision that the accused shall be allowed to meet the witnesses face to face; the objection to such evidence going to the competency of the evidence, and not to the competency of the witness. Robbins v. State, 8 O. S. 131.

When dying declarations are proved in a case, a statement of the deceased, made at another time, neither part of a dying declaration nor of the *res gestae*, is not admissible to impeach such declarations. Wroe v. State, 20 O. S. 460.

The dying declaration of the deceased, that the act was done without any provocation on his part, is not incompetent as mere matter of opinion. Wroe v. State, 20 O. S. 460.

The general rule of evidence is, that dying declarations are admissible only when the death of the declarant is the subject of the charge, and the circumstances of the death are the subject of the dying declarations. Upon an indictment for unlawfully using an instrument upon the person of a woman, with intent to destroy a vitalized embryo, in consequence of which she died, her dying declarations are inadmissible. State v. Harper, 35 O. S. 78.

Upon a trial for murder, after proper preliminary proof has been given, it is not error to admit in evidence and permit to be read to a jury a written statement of the injured person, made, *in extremis*, while conscious of his condition and under a sense of impending dissolution, where such declaration was at the time reduced to writing by a competent person at the instance of the declarant, or with his consent, was approved and signed by him, and containing statements of the circumstances of the unlawful act which is the subject of the charge. State v. Kindle, 47 O. S. 358.

Where, in a homicide case, alleged dying declarations of the person charged to have been killed by the defendant on trial, are sought to be offered in evidence against him (such declarations being in writing and purporting to be signed by the declarant), and the question whether such declarations are competent and admissible in evidence against him is submitted as a preliminary question to the trial judge, in the absence of the jury, and evidence is introduced thereon, and it is held by such judge to be competent and admissible, it is error to allow such alleged declarations to go to the jury as the dying declarations of such person, unless the state, shall first offer evidence to the jury tending to show that they were in fact dying declarations of the deceased person, made by him *in articulo mortis*, or *in extremis* and under a sense of speedy and impending death, which excluded from his mind all hope of recovery; that the jury might thus be advised by the evidence so offered by the state, and that offered by the defendant on this point (if any), what the facts as to those questions were, so that they could properly decide whether they were in fact dying declarations of the deceased person, and the weight and credit to be given to them, if any. Martin v. State, 17 C. C. 406; 9 O. C. D. 621.

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Declarations made by a person shortly after an assault in which she received injuries which caused her death are not competent as dying declarations upon the trial of her assailants, where it does not appear that at the time of making such declarations she knew or believed that she was about to die. Wade v. State, 2 C. C. N. S. 189; 15 O. C. D. 279. Affirmed, 70 O. S. 463.

Declarations made by the victim of a homicide some time after the assault which caused her death, at a house sixty rods distant from the scene of the crime, narrating certain facts in regard to the assault, are not part of the *res gestae*, and are not competent evidence upon the trial of her assailants. Wade v. State, 2 C. C. N. S. 189; 15 O. C. D. 279. Affirmed, 70 O. S. 463.

EXPERIMENT—

In a trial on indictment for malicious shooting, the prosecuting witness having testified to his position and attitude in the parlor of a tavern, when shot at, and sworn to the identity of the defendant as the person who shot at him, as seen through a glass window and by the light of the flash from the pistol, and the state having examined several witnesses who were not present at the shooting, to prove experiments and observations subsequently made by them at the same place, for the purpose of proving, by inference from such experiments and observations, that the prosecuting witness might or could have seen and known the defendant in the circumstances and in the manner related by him, it was competent for the defense to prove similar experiments with different results, made in another place, but in like circumstances. Though such testimony may have been of little weight, it was still proper to go to the jury. Smith v. State, 2 O. S. 511.

EXPERT TESTIMONY—

Whether a pugilistic encounter is a fight or a boxing exhibition is not a question upon which expert testimony is admissible, on the trial of an indictment for engaging in a prize fight. The question must be decided by the jury upon the evidence of what actually took place, under proper instructions from the court, and not upon the opinions of professional pugilists and others experienced in such combats, or the rules adopted by associations conducting such contests. Seville v. State, 49 O. S. 118.

Where the condition and position of the body of a deceased person found on a railroad track becomes material, as to whether death was occasioned by a passing train or by violence, railroad conductors and engineers are not competent, as experts, to give an opinion as to whether a train of cars, striking or passing over him, could have left the body in the condition or position in which it was found. Ardt v. State, 2 C. C. 18; 1 O. C. D. 337.

In the trial of an indictment for murder in the first degree, where the defense of insanity is relied upon, the opinion of a medical witness upon a hypothetical case, which assumes material facts which no evidence tends to establish, is irrelevant. Sharkey v. State, 4 C. C. 101; 2 O. C. D. 443.

Where, on the trial of an indictment for forging a will, an expert witness, on direct examination, after he had testified that the signature to the alleged will was forged, was asked if he would pay a check so signed. He answered he would not. *Held*, the question was improper, but the answer under his previous testimony was immaterial, and not substantial injury. Breck *et al* v. State, 4 C. C. 160; 2 O. C. D. 477.

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Upon the trial of a case, where the accused is charged with murder in the second degree, physicians having been called on behalf of the state, who testified that they had attended the *post mortem* examination, giving a full description of the wounds found upon the head of the deceased, their location and that they were sufficient to produce death, it is error to permit such witnesses to give testimony against the objection of the accused as to the probable relative position of the parties at the time the fatal blow was struck; such testimony is the mere opinion of the witnesses, based upon the facts proven, and from which the jury is as capable of drawing proper inferences as the witnesses. Perkins v. State, 5 C. C. 597; 3 O. C. D. 292.

After a witness has exhausted his knowledge of the facts, a question as to his opinion based on such facts is incompetent. Cottell v. State, 12 C. C. 467; 5 O. C. D. 472.

IMPEACHING WITNESS—

You can not, on cross-examination, ask a witness an irrelevant question for the purpose of contradicting the answer by other witnesses; but facts testified by a witness, in answer to questions asked, can be falsified by other witnesses. When a prosecuting witness was asked, on cross-examination, whether she had not made threats of doing all she could to send the defendant to the penitentiary, *semble*, that the question was improper; but if allowed and answered in the negative, this will not prevent the defendant from calling other witnesses to prove such declarations, they being competent independent of the question, inasmuch as they went to impeach her credit. Williams v. State, Wright, 42.

In impeaching the credit of a witness, the inquiry into his general reputation or character should be restricted to his reputation for truth and veracity. In making this inquiry, any form of words may be adopted by which to ascertain whether the impeaching witness has sufficient knowledge of the public estimation for truth in which the witness proposed to be impeached is held. Craig v. State, 5 O. S. 605. See Hills v. Wylie, 26 O. S. 574.

Where the defense has attempted to show by A that the defendant always had money in his possession, it is competent for the prosecution to prove in rebuttal statements of the witness, not in harmony with his testimony, in order to disqualify him. Mimms v. State, 16 O. S. 221.

Where, during a trial a witness testifies in behalf of the state that the goods were received and bought of him by the defendant, knowing that they were stolen; and, on cross-examination, he denied that he had any knowledge whatever of a letter shown to him, purporting to be written by him to the defendant, stating that he knew nothing against the accused relating to the transaction. *Held*, that for the purpose of impeaching the witness, the letter might be given in evidence by the defendant, on making *prima facie* proof that it was written at the dictation of the witness, and was in fact sent by him to the defendant. Shriedley v. State, 23 O. S. 130.

The rule that unless the party propounding a question to a witness discloses at the time what he expects to prove, the erroneous rejection of the question by the court will not be regarded as prejudicial to the party, does not apply where a witness, on cross-examination, is asked if he has not made statements inconsistent with his testimony in chief, the purpose and object of the inquiry being sufficiently manifest without such disclosure. Burt v. State, 23 O. S. 396.

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Where the plaintiff examines a witness in chief, who merely testifies to matters which are not controverted by defendant or his witnesses, and after the close of the defendant's testimony, the same witness, upon being recalled by the plaintiff as a rebutting witness, contradicts the testimony of the defendant and his witnesses, the defendant has a right then to prove the bad reputation of the witness for truth and veracity. Marts v. State, 26 O. S. 162.

The impeachment of the credit of a witness, by showing that he has made statements at other times, contradictory of his testimony given on trial, does not lay the foundation for sustaining him by proof of his reputation for truth. Webb v. State, 29 O. S. 351.

Evidence can not be given to prove an infamous crime against a witness, of which he has not been convicted, for the purpose of impeaching his credit. Webb v. State, 29 O. S. 351.

By statute, proof can be given that a witness has been convicted of an infamous crime, for the purpose of affecting his credibility. The effect of such conviction is to impeach the character of the witness as a man of truth, and where the record of the conviction is used to impeach a witness, his reputation for truth may be proved to rebut its effect. Webb v. State, 29 O. S. 351.

Where the question as to whether a witness has been guilty of an infamous crime of which he has not been convicted, becomes the legitimate subject of inquiry on the trial, his reputation for truth may be proved to rebut any imputation against his credit which the evidence of guilt makes against him. Webb v. State, 29 O. S. 351.

A witness called to impeach another, by showing statements inconsistent with those testified to, may himself, the proper foundation being laid therefor, be contradicted, by showing statements made by him out of court, inconsistent with those testified to by him in contradiction of such other witness. Berry v. State, 31 O. S. 219.

Where a convict, who has been in the penitentiary two years, is taken therefrom to testify as a witness, and does so testify, it is competent for the adverse party to prove that his reputation for truth and veracity was bad, at the time of and previous to the conviction, at the place where he then resided. Hamilton v. State, 34 O. S. 82.

On the trial of one charged with homicide, a witness on behalf of the state gave evidence tending to show that the defendant struck the blow which caused the death; and the witness having been cross-examined with a view to his contradiction, admitted that he had held a conversation on the subject of the homicide with another person, at a time and place stated, but denied that he had said to such person that it was not the defendant who struck the blow. *Held*, that the counsel for the state could not, on re-examination of the witness, show what he had said in such conversation, until testimony was offered to contradict such witness. Dickson v. State, 39 O. S. 73.

A party who calls a witness, and is taken by surprise by his unexpected and unfavorable testimony, may interrogate him in respect to declarations and statements previously made by him, which are inconsistent with his testimony, for the purpose of refreshing his recollection and inducing him to correct his testimony, or explain his apparent inconsistency; and for such purpose his previous declarations may be repeated to him, and he may be called upon to say whether they were made by him. In case the witness denies having made such statements, or his answer is

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ambiguous concerning them, it is not competent for the party calling him to prove them by other witnesses. Hurley v. State, 46 O. S. 320.

It is not error to permit a witness, who has made statements out of court at variance with his testimony given in the trial of a cause, to explain or give his reasons, if he has any, for making the contradictory statements; such conflict in statement goes only to affect his credibility and does not render him incompetent or necessarily render his testimony incredible.

Where it is claimed a witness, who testified before a grand jury, changed his testimony on the trial, an official court stenographer, who took his testimony before the grand jury in shorthand, may, as impeaching such witness, read his notes in evidence to the jury, if he remembers and can testify that at the time it was correctly taken, and that the notes contain all the evidence of the witness on the question at variance, although at the time he is called to testify he has no independent recollection of his testimony. Baum v. State, 6 C. C. N. S. 515; 17 O. C. D. 569.

INTENT—

See SCIENTER.

INSANITY—

If the prisoner was insane at the time of the commission of a crime, he must be acquitted. The same degree of insanity which would exonerate from the obligation of civil contracts will excuse for accountability for crime. Gardner v. State, Wright, 392.

If the prisoner was laboring under insanity, or such an estrangement of mind as left him without discretion to discern the difference between good and evil, or unconscious that he was doing wrong, he should be acquitted altogether. But, on the other hand, if his mind was such that he retained the power of discriminating, or was conscious that he was doing wrong, a state of mind in which, at the time of the deed, he was free to forbear or to do the act, he is responsible as a sane man. State v. Thompson, Wright, 617.

The statute defining the crime of murder is in these words: "If any person shall purposely, and of deliberate and premeditated malice," "kill another, every such person shall be deemed guilty of murder in the first degree." The words "purposely," "of deliberate and premeditated malice," as applied to the killing, have much meaning. Purposely implies an act of the will, an intention, a design to do the act. It presupposes the free agency of the actor. Deliberation and premeditation require action of the mind. They are operations of the intellectual faculties, and require an exercise of reason, reflection, judgment and decision, and can not happen in any case where the faculties of the mind are deranged, destroyed or do not exist. The crime of murder in the first degree can, therefore, only be perpetrated by a free agent, capable of acting or abstaining from action, free to embrace the right and reject the wrong. He must have a sound intellect, capable of reason, reflection, premeditation and under the control of the will. What, then, is the important question for the jury to try? It may be stated thus: Was the accused a free agent in forming the purpose to kill the deceased? Was he, at the time the act was committed, capable of judging whether the act was right or wrong? Did he know, at time, that it was an offense against the laws of God and man? If the jury say nay, he is innocent. If yea, and they find the killing to have been

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purposely, with deliberate and premeditated malice, he is guilty. Clark v. State, 12 O. 483.

In trying the question of sanity in a criminal case, the jury must bear in mind that the law presumes every person of the age of fourteen years to be of sufficient capacity to form the criminal purpose, and to deliberate and premeditate upon the acts which malice, anger, hatred, revenge or other evil disposition might impel him to perpetrate. To defeat this legal presumption which meets the defense of insanity at the threshold, the mental alienation relied upon by the accused must be affirmatively established by positive or circumstantial proof. The jury must be satisfied from the evidence that the perverted condition of the faculties of the mind, indicated in the main question which has been already stated as excusing from crime, did exist at the time the deceased was killed. Where, in a prosecution for a homicide, the defense is insanity, it is not sufficient if the proof barely shows that such a state of mind was possible; nor is it sufficient if it merely shows it to have been probable. The proof must be such as to overrule the legal presumption of sanity; it must satisfy you that he was not sane. It would be unsafe to let loose upon society great offenders upon mere theory, hypothesis or conjecture. A rule that would produce such a result would endanger the community, by creating a means of escape from criminal justice, which the artful and experienced would not fail to embrace. The defense of insanity is not uncommon. It is a defense often attempted, especially in cases where aggravated crimes have been committed, under circumstances which afford full proof of the overt acts, and render hopeless all other means of evading punishment. While, then, the plea of insanity is to be regarded as not less free and complete than it is a humane defense, when satisfactorily established, and while we should guard against inflicting the penalty of crime upon the unfortunate maniac, we should be equally careful that we do not suffer an ingenious counterfeit of the malady to furnish protection to guilt. Clark v. State, 12 O. 483.

A criminal act done during a lucid interval is an act for which the law will hold the individual accountable. But proof of prior insanity throws upon the state the burden of proving the crime perpetrated during a lucid interval. It defeats the legal presumption of sanity, and creates a legal presumption of continued lunacy, which, like the presumption of sanity, must be satisfactorily overthrown by proof. This is its sole effect. Clark v. State, 12 O. 483.

On a question of insanity, in a criminal case, a non-professional witness may state his opinion, in connection with the facts on which it is founded. And even the opinion of a physician, upon such a question, is entitled to little weight, unless the reasons for the opinion are stated and appear to sustain the opinion. Clark v. State, 12 O. 483.

On a trial for murder, where insanity was set up as a defense, a physician having stated, on examination in chief, that, in his opinion, the prisoner was insane, he might be asked on cross-examination, in order to test the accuracy and value of that opinion, whether he believed that the accused knew right from wrong—that it would be wrong for him to commit murder, rape, arson or burglary? Clark v. State, 12 O. 483.

The power of self-control—freedom of will to avoid a wrong—is an essential to criminal accountability no less than the power to distinguish between right and wrong. Farrar v. State, 2 O. S. 54.

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There is no authority for holding that mere moral insanity exonerates from responsibility. Farrar v. State, 2 O. S. 54.

Sanity is presumed until the contrary is clearly proved. But "clearly proved" is not the same as "proved beyond a reasonable doubt." The latter usually implies a higher degree of certainty than the former. If the preponderance of testimony is clearly on the side of insanity, it ought to be considered as clearly proved, though there is reasonable doubt of its existence. Farrar v. State, 2 O. S. 54.

It is not the rule that a reasonable doubt of sanity is sufficient to acquit. Insanity must be established by a clear preponderance of evidence. Farrar v. State, 2 O. S. 54.

Delirium tremens, although the result or consequence of continued drunkenness, is insanity, or a diseased state of the mind, and affects responsibility for crime in the same way as insanity produced by any other cause; for it is shunned by the patient, and not voluntarily assumed, either as a cloak for guilt or to nerve the perpetrator to the commission of crime. Maconnehey v. State, 5 O. S. 77.

As the law presumes every person who has reached the age of discretion to be of sufficient capacity to be responsible for crimes, the burden of establishing the insanity of the accused affirmatively, to the satisfaction of the jury, on the trial of a criminal case, rests upon the defense. It is not necessary, however, that this defense be established beyond a reasonable doubt; it is sufficient, if the jury is reasonably satisfied by the weight or preponderance of the evidence that the accused was insane at the time of the commission of the act. Loeffner v. State, 10 O. S. 598.

In the trial of an indictment for murder, the defense of insanity, under the plea of not guilty, does not change the nature of the issue so as to give the affirmative to the defendant, and entitle the defendant to the opening and closing argument to the jury. Loeffner v. State, 10 O. S. 598.

Where the defense of insanity is set up on the trial of an indictment for murder, it is not error to the prejudice of the accused to instruct the jury that the questions to be decided, as regards this defense, are these: Was the accused a free agent in forming the purpose to kill? Was he, at the time, capable of judging whether that act was right or wrong? And did he know, at the time, that it was an offense against the laws of God and man? Blackburn v. State, 23 O. S. 146.

The burden of proof to establish the defense of insanity in a criminal case rests upon the defendant. Bond v. State, 23 O. S. 349.

The burden of proof to establish the defense of insanity in a criminal case rests upon the defendant, but a bare preponderance of testimony is all that is necessary for that purpose. Bond v. State, 23 O. S. 349.

It is not error to refuse a charge that if the jury have a reasonable doubt of the prisoner's sanity, they must acquit. Bond v. State, 23 O. S. 349.

In the trial of a capital case, where the homicide is admitted, and the defense of insanity is set up, the burden of establishing the defense by a preponderance of testimony rests upon the defendant. Bergin v. State, 31 O. S. 111.

On A's trial for a crime, he relied on insanity as a defense, and as evidence tending to prove the defense offered a record from the probate court showing that four years previous to the commission of the alleged crime an inquest had been held in that court, and that he had been adjudged insane and confined in an asylum. *Held*, that the evidence was admissible. Wheeler v. State, 34 O. S. 394.

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Where, in a trial for murder, the accused sets up his insanity, as a defense, he is bound to establish it by a preponderance of the evidence, but should be held to no higher degree of proof.

The proof should be deemed to preponderate in favor of this, as of any other disputed fact, whenever its existence is made probable upon a full and fair consideration of all the evidence adduced for and against it.

An instruction given to the jury in such case to the effect that the evidence introduced to establish insanity is not "sufficient if it merely show it to have been probable. The proof must be such as to overcome the legal presumption of sanity; it must satisfy you he is insane," requires of the defendant more than a preponderance of the evidence to maintain this defense, and is therefore erroneous. Kelch v. State, 55 O. S. 146.

In the trial of an indictment for murder in the first degree, where the defense of insanity is relied upon, where there is no evidence tending to show a simulation of insanity, a direction to the jury to be careful not to "suffer an ingenious counterfeit of the malady to furnish protection to guilt," is misleading and prejudicial.

To establish the defense of insanity in such a case, a preponderance of the evidence only is necessary; and it is error to instruct the jury that it is not sufficient if it merely shows that the accused was probably insane when the homicide was committed. Sharkey v. State, 4 C. C. 101; 2 O. C. D. 443.

In the trial of an indictment for murder in the first degree, where the defense of insanity is relied upon, the opinion of a medical witness upon a hypothetical case, which assumes material facts which no evidence tends to establish, is irrelevant. Sharkey v. State, 4 C. C. 101; 2 O. C. D. 443.

A defense of sudden, uncontrollable epileptic homicidal impulse is governed by the legal rules affecting other defenses of insanity. State v. Leuth, 5 C. C. 94; 3 O. C. D. 48.

The rule admitting reputation as to family history does not extend to allow hearsay as to specific facts of sickness or peculiarities of individuals of the family. State v. Leuth, 5 C. C. 94; 3 O. C. D. 48.

Partial insanity, or an intellect so weak as to leave the accused without the power to deliberate and premeditate, is sufficient to reduce the grade of the offense to murder in the second degree. A much less degree of insanity will excuse the elements of deliberation and premeditation in the charge of murder in the first degree than would excuse from the entire criminal act. Cottell v. State, 12 C. C. 468; 5 O. C. D. 472.

Where in the trial of an indictment for murder, the defense being insanity, the court before the argument to the jury, gave several instructions, at defendant's request, upon the questions of reasonable doubt of insanity, and a definition in the language of the statute defining the crime of murder in the first degree, in the second degree, and manslaughter, and again in his general charge defined these crimes, it is not error to refuse a further request of defendant defining manslaughter made after argument, such request being a correct abstract proposition of law, but being inapplicable to the defense of insanity or to the facts of the case. Reighard v. State, 22 C. C. 340; 12 O. C. D. 382.

Where in a trial for homicide the insanity of the accused is set up as a defense, the burden of establishing such defense by a preponderance of the evidence rests upon the defendant. State v. Austin, 71 O. S. 317.

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The law presumes every person sane until the contrary is shown, and in a criminal case this presumption of sanity serves the state as the full equivalent of express proof until such time as it is made to appear by a preponderance of the evidence that the defendant was insane at the time of committing the crime alleged against him. State v. Austin, 71 O. S. 317.

On the trial of A, indicted for the crime of murder, it having been proved that prior to the commission of the alleged homicide he had twice been adjudged insane and committed to an asylum, but was discharged therefrom the last time nearly two years previous to the time of the homicide, counsel for defendant requested the court to give the jury the following instruction: "Proof of prior insanity throws upon the state the burden of proving the crime perpetrated during a lucid interval. It defeats the legal presumption of sanity and creates a legal presumption of continued lunacy."

Held: Such instruction was properly refused. State v. Austin, 71 O. S. 317.

The provisions of § 7240, Revised Statutes (G. C. 13608, 13609), are mandatory; and the mode therein prescribed for a trial of the question of the present insanity of a person under indictment is peremptory and exclusive. State v. Roselot, 69 O. S. 91.

When, therefore, at any time before sentence, the insanity of a defendant under indictment is suggested and brought to the attention of the court in which such indictment is pending in the manner provided in § 7240 (G. C. 13608, 13609), it is the imperative duty of the court to order a jury to be impaneled to try such question, and such jury when so impaneled, shall be specially sworn to try the question whether the defendant is or is not then sane. State v. Roselot, 69 O. S. 91.

INTOXICATION—Delirium Tremens—

See INSANITY.

Drunkenness is no excuse for crime; yet, in that class of crimes which depends upon guilty knowledge, evidence of the fact should be submitted to the consideration of the jury. In a charge of passing counterfeit money, if the person was so drunk that he actually did not know that he had passed a bill that was counterfeit, he is not guilty. It oftentimes requires much skill to detect a counterfeit. The crime of passing counterfeit money consists of knowingly passing it. To rebut that knowledge, or enable the jury to judge rightly of the matter, it is competent for the person charged to show that he was drunk at the time he passed the bill. It is a circumstance, among others, entitled to its just weight. P was indicted for uttering, publishing, bartering, and disposing of counterfeit bank-bills. The proof was the passing of a counterfeit twenty dollar bank-bill. On the trial, P offered to prove that he was drunk at the time he passed the bill, and therefore did not know what he was doing, nor that the bill was a counterfeit. The testimony having been excluded, it was held that the court erred. Pigman v. State, 14 O. 555.

Evidence of intoxication of the defendant at the time of committing the act for which he is indicted, having been admitted on the trial in view of its bearing on the question of intent, it is not error for the court to refuse to charge the jury that such intoxication is a circumstance proper to be taken into consideration by them, and should have its just weight in determining the malicious intent. Nor does this holding contravene the principle decided in Pigman v. State, 14 O. 555; Nichols v. State, 8 O. S. 435.

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Drunkenness is no excuse for crime; yet, in that class of crimes which depend upon the coolness and deliberation with which they have been perpetrated to constitute their commission, or fix the degree of guilt, evidence of the fact should be submitted to the consideration of the jury. Upon this principle, in modern cases, it has been permitted to show that the accused was drunk when he perpetrated the crime of killing, to rebut the idea that it was done in a cool and deliberate state of the mind, necessary to constitute murder in the first degree. Pigman v. State, 14 O. 555.

The other charges excepted to relate to the defense or effect of drunkenness. . . . As applicable to the crime of murder in the second degree, we understand the charge of the court simply to amount to this: that drunkenness, not amounting to insanity, is of little weight in such a case, unless it exists to an extent which shows that the accused was at the time incapable of forming a purpose, or that he did not intend the act he did; or unless it caused or was connected with a sudden quarrel, so as to make the act manslaughter; at least the charge is susceptible of this meaning, and in the absence of the other parts of the charge, we are bound to suppose that it was understood in that sense by the jury. Understood in that sense, we see no objection to the charge. It is substantially what was held in Nichols v. State, 8 O. S. 435. Davis v. State, 25 O. S. 369.

Where a charge of perjury is based upon testimony given in reference to a past transaction, evidence that the accused was "greatly intoxicated" at the time such transaction occurred is a circumstance proper to be submitted to the consideration of the jury in determining whether the accused knowingly testified falsely. Lytle v. State, 31 O. S. 196.

Intoxication is no defense to a prosecution for crime, but in some cases evidence of intoxication is admissible to show that no crime has been committed, or to show the degree or grade of crime; and in a prosecution for maliciously shooting with intent to wound, evidence that the defendant was so much intoxicated that he could not form or have such intent is admissible. Cline v. State, 43 O. S. 332.

Where an accused person denies that he committed the crime charged, and offers testimony tending to show that by reason of drunkenness he was incapable of committing such an offense, it is error to charge the jury that the burden is upon him to show want of capacity to commit the crime by reason of drunkenness, as such charge would shift upon him the burden of proving that he did not commit the crime. Jeffers v. State, 20 C. C. 294; 10 O. C. D. 832.

LEADING QUESTIONS—

See WITNESS.

NEGATIVE AVERMENT—

To convict on the charge of selling liquor to a minor, it is necessary for the state to prove that the seller knew the buyer to be a minor. Miller v. State, 3 O. S. 475.

To convict on a charge of selling liquor to a person intoxicated, it is necessary for the state to prove that the seller knew the buyer to be intoxicated. Miller v. State, 3 O. S. 475.

To convict on a charge of selling liquor to a person in the habit of getting intoxicated, it is necessary for the state to prove that the seller knew the buyer to be in the habit of getting intoxicated. Miller v. State, 3 O. S. 475.

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On the trial of an information for selling spirituous liquors not inspected, under the act of May 1, 1851 (4 Curwen, 2634), the state is bound to give some evidence in support of the negative averment that it was not inspected. It is an error to charge the jury, that the state is not required to prove that the liquor was not inspected; that on the state's proving a sale, the defendant is required to prove that the liquor was inspected. Cheadle v. State, 4 O. S. 477.

It is perfectly well settled that the indictment or information must, in all cases, contain the negative averment; and there is no doubt, as a general rule, some proof must be given to sustain it, where the ground of action rests upon such negative allegations, or where the statute, in describing the offense, contains such negative matter, and where the negative allegation involves a charge of criminal neglect of duty or otherwise. These rules, however, are subject to an established exception, where the subject matter of the negative averment lies peculiarly within the knowledge of defendant, can be readily and easily proved by him, and can not, without great inconvenience, be proved by the party making the averment. The rule (exception) does not depend upon a mere balancing of difficulties, and it is never applied, unless the proof is practically beyond the reach of the government and clearly within the power of the accused. Cheadle v. State, 4 O. S. 477.

In an indictment for the violation of § 1 of the act of May 1, 1854, "to provide against the evils resulting from the sale of intoxicating liquors in the State of Ohio," it is not necessary to a perfect description of the offense, as defined by § 1, that the indictment should contain an averment that the liquor was not "wine manufactured of the pure juice of the grape cultivated in the State of Ohio, or beer, ale, or cider," as specified in the proviso at the end of § 8 of said act. That proviso forms no part of the description of the offense of violating said § 1, being contained in a distinct section of the act fixing the penalty for such offense; and the benefits of said proviso must be taken advantage of by the accused in making his defense upon the facts. Becker v. State, 8 O. S. 391.

When the negative matter in a statute enters into the description of the defense, it must be averred in the indictment. In such cases, the general rule is, that some evidence must be given to sustain such negative allegations. Exceptions to this rule obtain only where the proof is readily at the command of the defendant, and is practically beyond the reach of the state. *Held*, therefore, in a prosecution for abortion, that the state must introduce some evidence in support of the allegation that it was not necessary to save the life of the mother. *Semble*, that the negative provision as to the advice of the physicians comes within the exception, and the state is not bound to prove it. Moody v. State, 17 O. S. 110.

A negative averment to the matter of a provision in a statute is not requisite in an indictment, unless the matter of such proviso enters into and becomes a part of the description of the offense, or is a qualification of the language defining or creating it. Billigheimer v. State, 32 O. S. 435; Hirn v. State, 1 O. S. 15.

When an offense against a criminal statute may, in the same transaction, be committed in one or more of several ways as therein provided, the indictment may, in a single count, charge its commission in any or all of the ways specified, if they are not repugnant. Hale v. State, 58 O. S. 676.

An indictment drawn under the act "to regulate the practice of medicine in the State of Ohio" (92 O. L. 44), which charges that the defendant, without having complied with the provisions of the act, for a fee prescribed, directed, and recommended for the use of a person named, a drug medicine, and agency, put up in a

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paper box on which he wrote directions to which he signed his name and appended therto the letters "M. D.," is not bad for duplicity. Hale v. State, 58 O. S. 676.

An averment in such indictment, that the defendant, at a time more than ninety days after the passage of the statute, practiced medicine in the county of his residence without having left with the probate judge of the county a certificate of the state board of medical registration and examination, is sufficient to show a failure to comply with the provisions of the statute. It is unnecessary to aver, either that the defendant was not a graduate of a medical college, or that he was not a legal practitioner of medicine when the statute was enacted. Hale v. State, 58 O. S. 676.

Where an exception or proviso in a criminal statute is a part of the description of the offense, it must be negatived by averment in the indictment in order to fully state the offense; but when its effect is merely to except specified acts or persons from the operation of the general prohibitory words of the statute, the negative averment is unnecessary. Hale v. State, 58 O. S. 676.

The proviso contained in § 4403f, of the act to regulate the practice of medicine in this state, is not descriptive of the offense made punishable by the first clause of § 4403g; and an indictment for such offense, otherwise good, is not demurrable for want of an averment negativing the facts to which the proviso relates. Hale v. State, 58 O. S. 676.

An ordinance of the city of Cincinnati made it unlawful to discharge fire-arms within the city limits. Persons in miltary array, those doing so in self-defense, or enforcing the laws, were expressly excepted from the operation of the section. The affidavit in the case did not allege that the act of the defendant did not come within the exceptions. It did not legally charge any offense against the ordinance, and the conviction of the defendant thereon was erroneous. Pope v. State, 3 C. C. 497; 2 O. C. D. 285.

Every indictment should contain a complete description of the offense charged, and must in all cases contain the negative averment if the matter of such exception enter into and become a part of the description of the offense. Corthell v. State, 11 C. C. 570; 5 O. C. D. 123.

In a prosecution under the "act to regulate the practice of medicine" passed February 27, 1896, it is not necessary to negative the provisions and exceptions as set forth in § 4403f in the information. Krowenstrat v. State, 15 C. C. 73; 8 O. C. D. 119.

An affidavit or information charging the proprietor of a junk shop with "failing to retain the metal for thirty days," as required by § 4413, Revised Statutes, substantially charges that he did not retain it, and is sufficient to notify the defendant of the offense with which he is charged; he is not prejudiced in his substantial rights thereby because the provision of the statute is not negatived. Neifeld v. State, 13-23 O. C. C. 246.

OFFICE—

In an indictment for resisting an officer, it is sufficient to prove that the officer issuing it was an acting justice of the peace, without producing his commission or proving his qualification. State v. Wallahan, Tappan's Rep. 803; Johnson v. Stedman, 3 O. 94.

In a prosecuton for violation of § 6908, Revised Statutes (G. C. 12858), which makes it an offense for one to resist, obstruct, or abuse any officer in the execution

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of his office, it is not essential to a conviction that the state should prove the using of direct, active or forcible or *quasi*-forcible means against the person of the officer. It is enough in that regard, if it is made to appear by the evidence, beyond a reasonable doubt, that the defendant knowingly and wilfully and in the presence of the officer, used forcible means to interfere with the custody of property lawfully in the possession of the officer and to take it unlawfully into his own possession. Campf v. State, 80 O. S. 321.

In a prosecution for the killing of an arresting officer, and the accused who killed such officer in resisting arrest interposes the defense that the warrant for the arrest was illegal, the consideration which should be given to such a defense depends upon the circumstances surrounding both the officer and the accused at the time of the homicide; and where the killing has been premeditated by the accused for some hours, and the officer was fully advised as to the crime, the same being a felony, and would have been authorized in making the arrest without a warrant, the question of the legality of the warrant under which the arrest was made is of no importance and does not excuse the wilful and premeditated killing of the officer. Coile v. State, 8 C. C. N. S. 596; 18 O. C. D. 827.

PARTICEPS CRIMINIS—Acts and declarations of—

See ACCOMPLICE.

PRESUMPTIONS—

In an indictment against W, one of the counts was framed on the act of 1835 (1 Curwen, 188, § 17), which provides, "that if any person shall assault another, with intent to commit a . . . rape . . . upon the person so assaulted, every person so offending shall be deemed guilty," etc. The counsel of W asked the court to charge the jury, that if they found that W, at the time of the commission of the offense, was under fourteen years of age, he could not be convicted of an assault with intent to commit a rape. The court refused so to charge, but charged that if they found that W was, at the time under fourteen years of age, that was presumptive evidence that he had not arrived at physical puberty; which presumption must be repelled by the state; and that if the jury found that W had in fact arrived at physical puberty, the circumstances of his being under fourteen years of age would not authorize the jury to acquit: *Held*, that the court did not err. The common law conclusively presumes that an infant, under fourteen years of age, is incapable of committing a rape, or the crime of attempting to commit it. That doctrine proceeds on the ground of impotency. But in this climate the age of puberty is earlier than in the moist and cold climate of England; and we adopt the common law only so far as it is applicable to our circumstances and condition. Hence with us the rule is, that while the law presumes incapacity in such case, the presumption may be rebutted. Williams v. State, 14 O. 222.

The law presumes every person who has reached the age of discretion to be of sufficient capacity to be responsible for crimes. Loeffner v. State, 10 O. S. 598.

Upon the trial of all criminal causes, the law presumes the party charged with crime to be innocent, and the burden of proof is upon the prosecutor, unless a different rule has been provided by statute. This legal presumption of innocence can be overcome only by full proofs, such as will exclude all reasonable doubt of the guilt of the accused. And the reason of this rule, resting upon the presumption of innocence, makes it applicable in all criminal trials. Fuller v. State, 12 O. S. 433.

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The defendant's attempt to prove alibi in a criminal case is no admission of the body of the crime charged; nor does his failure to prove it necessarily afford any presumption that he was present at the time and place when and where the crime is alleged to have been committed. Toler v. State, 16 O. S. 583.

The presumption of the law is, that a female child, under the age of ten years, is incapable of giving consent to an act of carnal knowledge, or of assault with intent to commit the act; but the presumption may be rebutted by proof that she understood the nature of the act committed or intended. O'Meara v. State, 17 O. S. 515.

The facts that a building was burglariously entered, goods stolen therefrom, and the possession by the accused soon thereafter of the goods stolen, are competent evidence to go to the jury, and the other circumstances indicative of guilt—such as giving a false account, or refusing to give any account of the manner in which, or the means by which, he came into possession of the stolen goods—may afford a strong presumption of the fact of the guilt of the accused, and warrant the jury in finding him guilty of both the burglary and the larceny. But the facts of burglary, of larceny, and of possession of the stolen goods soon after by the accused, do not alone raise a presumption of law that he is guilty of both the burglary and larceny. Methard v. State, 19 O. S. 363.

In judicial investigations, facts legally presumed are, until rebutted, as effective as facts proved. And, where a party claims to control the legal effect of facts by the alleged existence of other facts, the burden is on him to show a preponderance of evidence in favor of the existence of the latter. Facts, which are neither proved nor to be presumed, are, for judicial purposes, to be regarded as not existing. Silvus v. State, 22 O. S. 90.

The presumption that a married woman who commits a criminal act in the presence of her husband acts under his coercion is only *prima facie;* and when it is shown that she acted voluntarily, and not by coercion, she is liable to a prosecution. Tabler v. State, 34 O. S. 127.

An instruction to the jury, that the state must prove the material elements of the crime beyond a reasonable doubt, fully secures to the defendant the benefit of the legal presumption of his innocence. Morehead v. State, 34 O. S. 212.

If it appear, on the trial of one charged with rape, that he is a boy under fourteen years of age, the burden is on the state to prove capacity to commit the crime; and if the court enumerate certain facts which are of no determinate value, and say to the jury that if they are proven the burden is on the accused to show want of capacity, it is error. Hiltabiddle v. State, 35 O. S. 52.

It was error in the court to refuse to charge the jury as requested, or in substance, "that in the absence of direct evidence, something more than the possession or control of the property alleged to have been stolen is necessary to warrant a conviction in this case." Such a proposition of law must always be true—and the fact that in the charge requested, the court was asked to say that such was the law, if several persons were in charge of the property when it is alleged that it was stolen, and were not called as witnesses, did not make it unsound or improper to be given. McGuire v. State, 3 C. C. 551; 2 O. C. D. 318.

On the trial of a person indicted for aiding and abetting an owner of property to commit the crime defined in § 6832, the trial court charged the jury as follows: "The law presumes a person to intend the natural and probable consequences of his act; therefore, should you find from the testimony that the owner of the property procured the defendant to burn the same, that it was insured to said owner by

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said company against loss or damage by fire; that the natural and probable consequences of its being burned would be to prejudice, damage, or defraud such insurance company; then you will find such burning to be with the intent to prejudice, damage and defraud such company." *Held*, that such charge is erroneous as tending to mislead the jury into misapplying a general rule of law, and as treating the presumption alluded to as conclusive. Searles v. State, 6 C. C. 332; 3 O. C. D. 478.

It is not safe to judge of the acts and conduct of one possessed of a wicked purpose to kill by the ordinary conduct of men who act from honest motives, engaged in no unlawful enterprise. Murder itself is the exception, and not according to the ordinary rule of conduct in human affairs; and it is a matter of little surprise that the conduct of a murderer should not in all respects be consistent. The state of mind that would lead one to commit murder might naturally lead to other conduct not in all respects consistent with reason. But the fact that the transaction was strange and unnatural should lead to a greater care and caution in weighing the testimony, and should always be considered by the jury. Moran v. State, 11 C. C. 466; 5 O. C. D. 234.

In a prosecution for bigamy, the state having proven the first marriage, and produced the first wife in person, or accounted for her existence, the presumption is that the status once established by law continues, and the state is not bound to prove that there was no divorce. Whalen v. State, 12 C. C. 584; 5 O. C. D. 488.

The death of P resulted from a wound in a vital part inflicted by a pocket knife in the hands of B, who was convicted of murder in the second degree. The fact that P was thus slain by him was admitted by B. All of the circumstances of the homicide were fully shown by the evidence. There was some evidence tending to show that the wound was inflicted by B while he was under great fear and excitement, and that he did not intend to kill P.

The court charged the jury *inter alia* as follows:

When one person assaults another violently with a dangerous weapon likely to kill and not in self-defense or in defense of habitation, property or person, and not in a sudden heat of passion caused by provocation apparently sufficient to make the passion irresistible or involuntary, and the life of the party thus assaulted is destroyed in consequence of such assault, then the legal and natural presumption is that death or great bodily harm was intended, and in such case the law implied malice, and such killing would be murder."

Held, prejudicial error, because it required the jury to return a verdict of murder in the event of their finding that the defense of self-defense was not established, and that the defendant was not moved by passion produced by sudden provocation, though they may have believed that the defendant did not intend to kill. Bailus v. State, 16 C. C. 226; 8 O. C. D. 526.

On the trial of defendant on a charge of burglary and larceny, at defendant's request, the court instructed the jury in substance, that the fact of possession by defendant of the stolen property, soon after the burglary and larceny was committed, is not of itself sufficient to warrant a conviction of defendant, but that to warrant such conviction there must be some direct evidence, implicating defendant in the crime, in addition to the fact of possession.

Held. 1. The instruction was inaccurate in the use of the words "direct evidence;" "competent evidence" would have been correct. 2. While the instruction was inaccurate it was not prejudicial to the substantial rights of the defendant. Blaney v. State, 17 C. C. 486; 9 O. C. D. 616.

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Where a person is called upon to meet the charge of perjury in giving a denial of his guilt in a prosecution for adultery, his sworn statement to that effect still stands as his evidence, and in addition thereto is the legal presumption of innocence of perjury, which requires the state to do much more than reintroduce the circumstantial evidence upon which he was tried for adultery. State v. Courtright, 66 O. S. 35, 42.

In a prosecution for manslaughter, wherein the state relies for conviction on the ground that the deceased was killed unintentionally, while the slayer was in the commission of an unlawful act, it must be shown that the alleged unlawful act is prohibited by law; and it is not sufficient to establish that such act so engaged in, was a crime at common law, or one of gross and culpable negligence. Johnson v. State, 66 O. S. 59.

The facts of burglary, of larceny, and of possession of the stolen goods soon thereafter by the accused, do not, alone, raise a presumption of law that the accused is guilty of both the burglary and the larceny, but they do raise a presumption against him strong enough to call upon him to explain how he came in possession of the goods. Carano v. State, 3 C. C. N. S. 629; 14 O. C. D. 93; affirmed, 69 O. S. 561

Evidence as to the disappearance of the deceased, the finding of his body two weeks later with contusions on the head, and abrasions on the neck and other parts of the body, together with the testimony of reputable physicians that death was caused by suffocation, if it does not establish beyond a reasonable doubt that the deceased came to his death by violence, at least outweighs the idea of death by accident and reasonably brings to the jury the theory that violence was employed. Williams v. State, 11 C. C. N. S. 4; 20 O. C. D. 342; affirmed 53 W. L. B. 28.

A *prima facie* case of criminal liability is made against a principal, when it is shown that an act which is made an offense under the statutes was done by his agent in the course of his employment and with the apparent authority of the principal. Wood v. State, 10 C. C. N. S. 371; 20 O. C. D. 255.

PRINCIPAL AND ACCESSORY—

See ACCOMPLICE.

PRVILEGED COMMUNICATON—

The statements of one accused of crime made to one whose regular employment is, and for many years has been, practicing law before justices of the peace, and whose aid and counsel is sought as such attorney or counselor, such statements being made in answer to the inquiries of such adviser as to what the facts concerning the alleged offense were, are privileged communications, and it is error to allow such adviser to testify, upon the trial of the accused, to the statements so made, although the witness had not been admitted to practice in the courts of record of the state. Benedict v. State, 44 O. S. 679.

REASONABLE DOUBT—

The accused cannot be lawfully convicted unless the evidence establishes the guilt beyond a reasonable doubt. What, then, is a reasonable doubt? A verdict of guilty can never be returned, without convincing evidence. The law is too humane to demand a conviction while a rational doubt remains in the minds of the jury. The jury will be justified, and are required to consider a reasonable doubt as exist-

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ing, if the material facts, without which guilt cannot be established, may fairly be reconciled with innocence. In human affairs, absolute certainty is not always attainable. From the nature of things, reasonable certainty is all that can be attained on many subjects. When a full and candid consideration of the evidence produces a conviction of guilt, and satisfies the mind to a reasonable certainty, a mere captious or ingenious artificial doubt is of no avail. The jury must look to the evidence, and if that satisfies them of the defendant's guilt, they must say so; but if they are not fully satisfied, and find only that there are strong probabilities of guilt, the only safe course is to acquit. Clark v. State, 12 O. 483.

"Proved beyond a reasonable doubt," and "clearly proved," do not mean the same; the former implies higher authority than the latter. Farrar v. State, 2 O. S. 54.

The presumption of the law is, that a female child, under the age of ten years, is incapable of giving consent to an act of carnal knowledge, or of assault with intent to commit the act; but the presumption may be rebutted by proof that she understood the nature of the act committed or intended. A preponderance of evidence is sufficient to rebut such presumption, and it is, therefore, error to charge the jury that the rebutting evidence in such case must show the female's capacity beyond a reasonable doubt. O'Meara v. State, 17 O. S. 515.

On the trial of an indictment for murder, the burden of proving that the homicide was excusable on the ground of self-defense, rests on the defendant, and must be established by a preponderance of the evidence. Silvus v. State, 22 O. S. 90; Weaver v. State, 24 O. S. 584.

The burden of proof to establish the defense of insanity, in a criminal case, rests upon the defendant, but a bare preponderance of testimony is all that is necessary for that purpose. Bond v. State, 23 O. S. 349.

On the trial, under an indictment for burglary, every essential element in the charge must be proved beyond a reasonable doubt; and it is misleading to instruct the jury "that it is not necessary that every fact requisite to constitute burglary should be proved beyond a reasonable doubt, but the jury must look to all the facts and circumstances, and be able to say that the defendant is guilty beyond a reasonable doubt." Adams v. State, 31 O. S. 462.

An instruction by court to the jury, that the state must prove the material elements of the crime beyond a reasonable doubt, fully secures to the defendant the benefit of the legal presumption of his innocence. Morehead v. State, 34 O. S. 212.

The burden of proof is not changed when the defendant undertakes to prove an alibi, and if, by reason of the evidence in relation to such alibi, the jury should entertain reasonable doubt as to the defendant's guilt, he should be acquitted, although the jury might not be able to find that the alibi was fully proved. Walters v. State, 39 O. S. 215.

An instruction to a jury that a reasonable doubt "is a doubt that you, as jurors, can give a reason for," is inaccurate and misleading, and the fault is not cured by prefacing the statement with the instruction that "by a reasonable doubt is meant not a captious or whimsical doubt." Morgan v. State, 48 O. S. 371.

An intention to kill is an essential element of the crime of murder in this state, and must be established beyond a reasonable doubt to authorize a verdict of murder in the first or second degree. This rule is not changed by reason of the accused contending, and introducing evidence tending to prove, that the homicide was accidental; the legal effect of such evidence being simply to controvert an

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inference of an intent to kill, which may arise from the evidence introduced by the state. Jones v. State, 51 O. S. 331.

The proper charge to a jury in a criminal case is, that the jury and not that each juror, should be convinced beyond reasonable doubt of the guilt of the accused before finding him guilty. Davis v. State, 63 O. S. 173.

The defendant asked the court to charge, "that before the defendant can be found guilty, every juror must be convinced or satisfied, beyond a reasonable doubt, of the guilt of the defendant as charged in the indictment." The instruction asked for was correct, and was not substantially covered by a charge that the proof must satisfy the jury beyond a reasonable doubt of the guilt of the defendant, before they could properly convict him. McGuire v. State, 3 C. C. 551; 2 O. C. D. 318.

Where reliance for conviction is upon circumstantial evidence, it is not necessary that a circumstance should be proved beyond a reasonable doubt, unless it is a necessary link in a chain of circumstances, which chain of circumstances is necessary to a conviction. A person may be properly convicted by a large number of circumstances, no one of which alone is established beyond a reasonable doubt. Breck *et al* v. State, 4 C. C. 161; 2 O. C. D. 477.

To convict a person charged with crime by the act and declaration of another person jointly indicted with such person, a conspiracy must be proven beyond a reasonable doubt. Ditzler v. State, 4 C. C. 551; 2 O. C. D. 702.

It is not necessary to a conviction under the act of March 26, 1891, 88 O. L. 231, for selling adulterated wine, that the jury should be satisfied beyond a reasonable doubt that the accused must have known the wine to be adulterated. Altschul v. State, 8 C. C. 214; 4 O. C. D. 402.

A charge to the jury in a criminal case which directly or inferentially assumes that doubts as to the guilt of the defendant are *prima facie* unreasonable, and by which the jurors are cautioned and directed not to respect such doubts until an effectual effort has been made by them to divest their minds of the same, is erroneous. Rose v. State, 13 C. C. 342; 7 O. C. D. 226.

The refusal of a request to charge that "if after consideration of the whole case any one of the jury should entertain a reasonable doubt of the guilt of the defendants or either of them, it is the duty of such juror not to vote for a verdict of guilty," is not error, and the duty of the jury in that regard is sufficiently explained by a charge of the court that "before a conviction can be rightfully returned against these defendants upon this indictment or upon any count of it, the evidence offered in support of each charge must satisfy the jury beyond a reasonable doubt before a conviction can be had." McGuire v. State, 3 C. C. 551; 2 O. C. D. 318; not followed. Davis v. State, 20 C. C. 430; 10 O. C. D. 738.

The fact, that in a criminal proceeding submitted to the court substantially upon the testimony of the complaining witness and the defendant, there is a direct conflict as to a question of fact, is not sufficient to warrant a reviewing court in setting aside the judgment of the trial court, finding, beyond a reasonable doubt, that the defendant is guilty of the offense charged, for the reason that the trial court had the opportunity of seeing the witnesses, observing their conduct on the stand, their candor, etc., and had a better opportunity of reaching a just conclusion and determining where the truth lies than a court that knows nothing about the case except what appears in the written record. Neifeld v. State, 13-23 O. C. C. 246.

One on trial for a crime is not denied the benefit of a reasonable doubt by the instruction to the jury that there should be a verdict of guilty, if a full and candid

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consideration of the evidence produces a conviction of guilt, and satisfies the mind to a reasonable certainty; but that there should be an acquittal if the evidence establishes only strong probabilities of guilt. State v. Allen, 68 O. S. 516.

It is not error in such case for the court, in connection with proper instructions with respect to the several degrees of murder, and as to assault and battery, to charge, if the facts proven warrant it, as follows: "Has the state established by clear, convincing and satisfactory evidence beyond a reasonable doubt, that the defendant is guilty as charged in the indictment or of some other degree of murder or manslaughter, or it may be assault and battery, or assault merely; otherwise your verdict should be not guilty." Lindsey v. State, 69 O. S. 215.

On the trial of such indictment, the court is not required to instruct the jury that no person so convicted and imprisoned "shall be recommended for pardon by the board of pardons, or for parole by the board of managers of the penitentiary except upon proof of innocence established beyond a reasonable doubt;" and the omission to so instruct the jury is not error. State v. Schiller, 70 O. S. 1.

The proof required to establish a conspiracy for such a purpose is not proof beyond a reasonable doubt, but such proof as fairly raises a presumption or inference of a conspiracy. Hutchinson v. State, 8 C. C. N. S. 313; 18 O. C. D. 595; affirmed 51 W. L. B. 56.

The proof offered, that a certain mark opposite certain names on the certified list of voters at a primary election was made by the defendant, in this case, was sufficient to establish that fact beyond a reasonable doubt; and the use of these marks as a standard, from comparison with which an expert testified that other marks made opposite other names were made by the same hand, was a legal method of proof and established the fact claimed beyond a reasonable doubt. Ryan v. State, 10 C. C. N. S. 497; 20 O. C. D. 306.

Where in an indictment for murder in the first degree, it is charged that there were two shots fired and two mortal wounds inflicted from which death resulted, the state is not compelled to prove, beyond a reasonable doubt, that either the first or second shot alone, produced the death, nor if the death result only from the combined effects or results of both shots, that each of said shots were fired unlawfully. Wray v. State, 17 O. C. D. 1.

REPUTATION—

In a prosecution under § 22 of the crimes act, for passing counterfeit bills, purporting to have been issued by the bank of another state, the existence of the foreign corporation may be proved by one who, of his own knowledge, is acquainted with the fact, or by one who has seen or handled its notes, currently passed in the community as the notes of such institution, or by general reputation. Reed v. State, 15 O. 217.

Where an indictment charges the defendant with being the clerk of an incorporated railway company, and having fraudulently embezzled and converted to his own use the property of the corporation, then unde his care, by virtue of his employment as such clerk, it is sufficient to establish the corporate existence of the company by showing that it assumed to be and notoriously exercised the franchise of a railroad corporation. Calkins v. State, 18 O. S. 366; Burke v. State, 34 O. S. 79.

Evidence tending to show that improper and criminal relations had existed between the defendant and the wife of the deceased, for some time previous to the homicide, was properly received. If such were the case, it might be relevant as tending to show a motive on the part of the defendant to take the life of the hus-

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band. But where such evidence was introduced by the state, it was error for the court to exclude evidence offered by the defendant, tending to show that during all of this time the character and reputation of the wife as a pure and virtuous woman was above reproach. Martin v. State, 17 C. C. 407; 9 O. C. D. 621.

RES GESTAE—

L was convicted of stealing "a flea-bitten gray mare," the property of H in T county. On the trial, the state offered evidence tending to show the loss of the mare on the 14th or 15th of June; that, on the evening before the mare was taken, L was seen traveling with a companion in a sulky, driving a black or dark brown mare; and that the mare described in the indictment was found in the possession of L. L then offered a witness, who testified that about the middle of June, at the town of S, in C county, one D offered to trade to witness a flea-bitten gray mare, which mare, L, on the trial, claimed was the one described in the indictment. The witness further testified that, on the same day, L came to the town of S, traveling with a companion in a sulky, and driving a black or dark brown mare, in the manner proved by the state; and that D, at the time, bantered L to buy said mare. The counsel of L then inquired of the witness what was said, at the time, by D and L, as to the terms of the sale, and what was said by them, at the time, as to the fact whether said sale was complete. To this evidence the prosecutor objected, and the court ruled that it was incompetent for the accused to give evidence to the jury of conversations had between him and D; that the accused might prove any facts connected with such sale, but that his and D's declarations could not be detailed to the jury to prove that such sale was made. *Held*, that this was error. It had become material for L to explain to the jury his possession of the mare. To do this, he did not offer his own declaration that he had bought the mare, as one thing *inter alios acta*, as the court seemed to suppose, but the conversation between him and D, by which it was claimed a bargain and sale had been completed and the ownership transferred. It was competent to show a bargain and sale, which would explain the inference of guilt the law raises from the possession of stolen goods; and the best evidence of that agreement was the declarations of the parties to it at the time it was made, for such declarations are a part of the *res gestae*, and constitute the contract. Leggett v. State, 15 O. 282.

Where, on a trial for murder, it is shown that property, in the possession of the deceased shortly before the murder, was soon thereafter found concealed on the premises of a third person, about that time in company with the defendant, it is competent for the state to prove the acts and declaration of such third person, accompanying the discovery of the property, as a circumstance for the consideration of the jury, in connection with other proof, in determining whether he was made such custodian by the defendant. Mimms v. State, 16 O. S. 221.

It is not competent for a defendant, on trial for murder, to prove declarations made by himself immediately after the homicide, in regard to the fact of the homicide and the circumstances attending it. Such declarations form no part of the *res gestae*, but are simply a narrative made by the defendant in relation to a past transaction. So, held, where parties in a wagon about ten rods from the scene saw the fatal shot fired, and the accused immediately came toward them and made the declaration offered. Forrest v. State, 21 O. S. 641.

Where an act or transaction is given in evidence, for the purpose of showing the motive or state of mind which actuated the parties to it, it is proper, at least as a general rule, to permit the parties to be affected to show the immediate cir-

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cumstances which led to the transaction; otherwise, the real object of the inquiry may not be ascertained. Ruffer v. State, 25 O. S. 464.

On a trial for homicide caused by a deadly weapon in the hands of either the accused or his brother, both of whom were engaged in an affray with the deceased, in which affray the latter first attacked the brothers, there was a conflict in the evidence as to which struck the fatal blow. *Held*, that threats of the deceased, which may have referred to the brother, made to a third person present immediately preceding the attack, though not communicated to the defendant or his brother, are competent as part of the *res gestae*. Dickson v. State, 39 O. S. 73.

On the trial of one charged with homicide, where the defense is that the killing was done in resisting an attack from a mob, the cries of the mob from the time it was formed, though made before the deceased joined it, are competent evidence to prove its spirit and purposes, and as reflecting upon its attitude at the time the alleged attack was made. Goins v. State, 46 O. S. 457.

Where one is on trial for homicide, and is defending on the ground that the killing was done in repelling the attack of a mob, he has a right to prove, and have the jury consider, the violent, malicious, and criminal acts and declarations of the mob. Goins v. State, 46 O. S. 457.

The defendant and his son jointly indicted for murder by shooting, on the trial of the former, evidence of the son's statements, made at his home soon after the killing occurred, tending to show who fired the fatal shot, was offered by him and refused. *Held*, no error, as what was said did not appear to be part of the *res gestae*. Donald v. State, 21 C. C. 124; 11 O. C. D. 483.

On the trial of a prosecution under § 4364-25, Revised Statutes (G. C. 13229), for keeping a place where intoxicating liquors are kept for sale, given and furnished as a beverage, and for an illegal sale of intoxicating liquors to be used as a beverage, it is error to admit, over the objection of the state, testimony that the defendant, at other times refused to sell or give away such liquor as a beverage to the same or other persons. State v. Linder, 76 O. S. 463.

On the trial of an indictment charging the defendant with having carnally known and abused a female person under sixteen years of age with her consent, evidence of similar prior acts of sexual intercourse between the accused and the prosecutrix within a period of two months immediately preceding the date laid in the indictment, is admissible for the purpose of showing the relation and intimacy of the parties, and as corroborative of the testimony of the prosecutrix touching the particular act relied upon for a conviction. Boyd v. State, 81 O. S. 239.

Where the crime charged is the making of a false receipt for the payment of money with intent to defraud, evidence of similar offenses or similar transactions by the same defendant is competent as tending to show the motive or intent with which the receipt in question was made, altered or forged, and its use in connection with other instruments forged by the defendant. Lingafelter v. State, 8 C. C. N. S. 537; 18 O. C. D. 800; affirmed, 51 W. L. B. 377.

Frequent acts of sexual intercourse between a teacher and his female pupil at times other than that charged in the indictment for such an offense, even acts at a time when the term of employment as such teacher has ceased, and acts outside the county in which the indictment is returned, if such acts are continuous and consecutive with the act charged, may be given in evidence on the trial under such an indictment as reflecting light on the relations between the parties. Easley v. State, 19 O. C. D. 568.

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RIGHT TO FACE WITNESSES—

It is a fundamental principle in this state, that in criminal prosecutions the accused has not only the right to be heard, by himself or counsel, but to meet the witnesses face to face, to require the testimony against him to be under the sanctity of an oath, and that the witnesses shall be subject to any competent cross-examination. In a prosecution for forgery, it became material to prove that the maker of certain notes and the drawer of certain bills of exchange were fictitious persons. For this purpose, the prosecutor offered a letter of a cashier of a bank, to whom said notes and bills had been forwarded for collection, and also offered the protest of a notary. *Held,* that the evidence was incompetent. Farrington v. State, 10 O. 354.

The clause of § 10 of the bill of rights, providing that "on any trial in any court, the party accused shall be allowed to meet the witnesses face to face," which, like numerous other provisions in the bill of rights, is a constitutional guaranty of a fundamental principle well established and long recognized at common law, has reference to the personal presence of the witnesses called to testify, and not the quality or competency of the evidence to be given. Testimony proving the statements made by a deceased witness, on oath, at a former trial between the same parties, being one of the established exceptions to the rule that hearsay is incompetent as evidence, the admission of a witness to give evidence of this kind in a criminal case does not contravene the aforesaid provision of the constitution. Summons v. State, 5 O. S. 325.

In the trial of a criminal case, evidence of the testimony delivered in a previous trial of the same case by a witness not dead, but beyond the jurisdiction of the court, or limits of the state, is not admissible unless it appear to the satisfaction of the trial court, that the witness is absent through the connivance or by the procurement of the accused. State v. Wing, 66 O. S. 407.

SCIENTER—

Where the *scienter* is part of the statutory description of the offense, it must be laid in the indictment. Gatewood v. State, 4 O. 386.

The defendant was charged with having in his possession for sale and with selling certain counterfeit bank-notes. On the trial, the prosecutor, to prove the guilty knowledge of the accused, offered testimony to show that three days after the arrest of the prisoner, and while he was in jail, other counterfeit bank-notes were found secreted near his dwelling-house, in a dwelling which he had formerly occupied. The prosecutor also offered to prove by a witness, for the same purpose, that on the evening after the defendant was arrested, the witness took from the hands of the defendant's wife, at the defendant's dwelling, and while he was in jail, a purse containing sixty dollars in counterfeit bank-notes. And it was *held,* that this evidence was properly admitted. Hess v. State, 5 O. 5.

In a prosecution for concealing a horse-thief, it is not competent for the prosecutor to prove the confessions of the alleged thief, in the presence of the defendant, to establish the fact that the horse was stolen. Morrison v. State, 5 O. 438.

Association with horse-thieves, or subsequent confederation to steal horses, is not admissible evidence on a prosecution for stealing a specified horse. Cheney v. State, 7 O. 219.

On the trial of a person charged with passing counterfeit bank-notes, it is competent to prove that he or his associate in the crime, in his presence, about the same

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time, passed other counterfeit notes of a similar character. Reed v. State, 15 O. 217.

On the trial of an indictment for larceny, it is error to permit evidence to go to the jury for the purpose of proving that just before the defendant committed the act for which he is on trial, he committed another larceny. Barton v. State, 18 O. 221.

On an indictment charging the prisoner with poisoning A, in December 1851, it is error to permit evidence in chief to show that she poisoned B, in the month of August previous. Farrar v. State, 2 O. S. 54.

Upon the trial of an indictment for having possession of spurious bank-notes with guilty intent, it is not competent for the state to prove that appliances and material for the manufacture of spurious coin were found in the possession of the accused, in order to show his knowledge of the "counterfeit character" of the notes, his "control and use" of the same, or his "criminal intent as to their use." The extent of the rule, in such cases, is to admit in evidence, for the above purpose, the fact of possession by the accused of other counterfeits similar in kind to those mentioned in the indictment. Bluff v. State, 10 O. S. 547.

Proof tending to connect another party with the defendant as a *particeps criminis* will not justify the introduction in evidence of counterfeit bills found upon such other party fifty days after the sale charged, though such bills be of the same manufacture with those proved to have been sold by the defendant—there being no evidence of any intercourse or association between the defendant and such other party during the intervening time. Griffin v. State, 14 O. S. 55.

Upon the trial on an indictment for receiving and buying certain stolen goods, knowing them to have been stolen, evidence that other goods known to have been stolen were previously received and bought by the defendant of the same thief is admissible for the purpose of showing guilty knowledge, on the part of the accused, that the goods, for receiving which he is charged, were stolen. Shriedley v. State, 23 O. S. 130.

Upon the trial of an indictment for knowingly delivering skimmed milk to a factory, to be manufactured into cheese, with intent to defraud, evidence of transactions of the same kind, other than that relied upon for a conviction, near the same time, is admissible for the purpose of showing guilty knowledge, on the part of the accused, that the milk, for delivering which a conviction is sought, was skimmed milk. State v. Bainbridge, 30 O. S. 264.

On the trial of a person charged with an assault with intent to rob, it is error to admit testimony on behalf of the state, tending to prove the defendant guilty of other assaults committed by him about the same time. Coble v. State, 31 O. S. 100.

When one does an act apparently in violation of a criminal statute, but, in fact, under circumstances that tend to show a want of guilty intention, the excusing circumstances may be given in evidence on the trial, to show his good faith in the transaction, where that is a material element, or that he was ignorant of the facts that would make his acts criminal. Farrell v. State, 32 O. S. 456.

On the trial of a person accused of uttering and publishing a forged deed for the conveyance of real estate with intent to defraud, other forged deeds for the conveyance of real estate, including deeds of trust, made to a trustee to secure the payment of promissory notes or bonds, found in his possession, or proved to have

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been uttered and published by him, are competent testimony to show the guilty knowledge of the accused. Lindsey v. State, 34 O. S. 507.

It is incompetent for a witness to state his opinion upon a question of law; but, where the intent with which an act done by him is drawn in question, he may testify as to such intent. Ohio Coal Co. v. Davenport, 37 O. S. 194.

Evidence of similar offenses by the same parties, shortly prior to the time of the offense charged, is competent, on the trial of an indictment under § 7076, Revised Statutes, to show knowledge of the falsity of the representations at the time when made. Tarbox v. State, 38 O. S. 581.

In a prosecution under said act, it is not a defense that the accused is ignorant of the adulteration of the article which he sells or offers for sale. State v. Kelly, 54 O. S. 166.

Where a father, placed upon trial for killing his son, a youth of about sixteen years, contended that the boy had left home to associate with immoral women, with whom he was being criminally intimate, and that the homicide was accidentally committed while the father was attempting to reclaim his son, evidence of the character of such women is competent as reflecting upon the motives of the father in seeking the son. Jones v. State, 51 O. S. 331.

Upon the trial of a person charged with the crime of rape upon his daughter, under an indictment which alleged that the crime was committed on the 20th day of November, 1889, after proof was offered by the state to sustain the indictment, it is error to permit the state, against the objection of the accused, to offer evidence of another separate offense of the same character claimd to have been committed on the 20th day of October of the same year. Snurr v. State, 4 C. C. 393; 2 O. C. D. 614.

On the trial of an indictment for forgery, proof of the possession by the defendant of other forged notes about the time of the making and uttering of the note in question is admissible as bearing upon the question of guilty knowledge or intent whether such possession be before or after the alleged forgery. And such proof is admissible, though several months intervene between the time of the alleged commission of the forgery charged in the indictment and the possession by the defendant of such other forged notes, in a case where the evidence clearly tends to prove that her possession of and dealing with the several notes were related parts of the execution of a connected scheme or plan of fraud and forgery. Devere v. State, 5 C. C. 510; 3 O. C. D. 24.

On the trial of an indictment for forgery by uttering forged paper, testimony of transactions by the defendant with other notes and papers, and which tend to prove her to have been carrying on one connected plan of fraud and forgery, whereof the forgery charged in the indictment was a part, and which testimony tends to connect her with the uttering of the note charged in the indictment, is admissible, although no direct proof is given that such other notes were forged. Devere v. State, 5 C. C. 510; 3 O. C. D. 24.

The rule which excludes oral proof of the contents of a deed is not applicable to prevent inquiry on the cross-examination of a witness, as to his motives and purposes in procuring it, in a case where his motives are material, and he has given evidence in chief regarding them. Boyle v. State, 6 C. C. 163; 3 O. C. D. 397.

Under the provisions of said statute, guilty knowledge of adulteration is not essential. Vendors of foods are charged with knowledge of their purity, and in

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prosecutions for sales of adulterated foods, ignorance of the fact of adulteration is not a defense. Bissman v. State, 9 C. C. 714; 6 O. C. D. 712.

It is not competent for the defendant in a prosecution under that act to prove want of knowledge as a defense. Altschull v. State, 8 C. C. R. 214; affirmed Myers v. State, 10 C. C. 226; 6 O. C. D. 477.

Proof that the defendant, prior to the commission of the alleged crime of murder, had seduced the deceased is incompetent, unless it affirmatively appears that such seduction was in some way connected with said crime as motive therefor or otherwise. Rose v. State, 13 C. C. 342; 7 O. C. D. 226.

Ordinarily, in criminal cases, the state is confined in its proof to the transactions described in the indictment or information, and will not be allowed to show others not set forth. Krowenstrot v. State, 15 C. C. 73; 8 O. C. D. 119.

The trial court in this case in allowing the state to offer evidence as to what took place in Masonic Lodge in regard to the proceedings of such lodge, and of its officers as to a complaint filed therein against the defendant on the charge of unmasonic conduct. It was admissible to show that a copy of the charges so preferred was served upon the defendant by an officer of the lodge, shortly before the killing of McMillan by the defendant, as tending to show a motive on the part of the defendant for acting as he did. Martin v. State, 17 C. C. 406; 9 O. C. D. 621.

Evidence tending to show that improper and criminal relations had existed between the defendant and the wife of the deceased, for some time previous to the homicide, was properly received. If such were the case, it might be relevant as tending to show a motive on the part of the defendant to take the life of the husband. But where such evidence was introduced by the state, it was error for the court to exclude evidence offered by the defendant, tending to show that during all of this time the character and reputation of the wife as a pure and virtuous woman was above reproach. Martin v. State, 17 C. C. 406; 9 O. C. D. 621.

In a trial upon indictment containing two counts, one for assault with intent to rape and the other for assault with intent to rob, the intent is a substantive part of the offense and must be proved beyond a reasonable doubt.

In such case the reviewing court, in passing upon the question as to whether or not the verdict is clearly against the weight of the evidence, will take into consideration the rule as to the *quantum* of proof necessary to convict in the lower court. Coles v. State, 13-23 O. C. C. 313.

SELF-DEFENSE—

In a trial for murder, it is competent for the defendant to prove that the person alleged to have been murdered, and others, had agreed to go to the house where the defendant boarded, for the purpose of quarreling with him, and that they had approached him with that intent at the time the affray commenced, which resulted in the homicide; and to prove the conversation of the parties, in relation to such agreement, though the defendant had not been informed of the intent of the parties in approaching him. Stewart v. State, 19 O. 302.

In a trial for murder, it is competent for the defendant to prove how he was employed at the time he met with the person he is charged to have killed, and what was his conduct a short time before the affray, which resulted in the killing. Stewart v. State, 19 O. 302.

It is competent for the defendant to ask a witness who had seen the transaction, whether, when the deceased rushed on the accused, there was time enough for

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him to escape, and get out of the way before the deceased rushed on him, or not. Stewart v. State, 19 O. 302.

Parent and child, husband and wife, master and servant, would be excused should they even kill an assailant in the necessary defense of each other. If a father and son combine to assail another, and commit violence upon his person, they may both stand in the relation of principal offenders, and be held liable in the same manner as if either had combined with any other person to commit similar violence. And in such case no intent to aid or defend each other on account of the relationship subsisting between them can be inferred by court or jury. Sharp v. State, 19 O. 379.

A man may, in his defense, employ sufficient force to repel the assailant. The law does not measure nicely the degree of force which may be employed by a person attacked, and, if he uses more force than is necessary, he is not responsible for it, unless it is so disproportioned to his apparent danger as to show wantonness, revenge or a malicious purpose to injure the assailant. Stewart v. State, 1 O. S. 66.

When the slayer seeks and provokes an assault upon himself, in order to have a pretext for stabbing his adversary, and does, upon being assaulted, stab and kill him, such killing is not excusable homicide in self-defense. Stewart v. State, 1 O. S. 66.

It is not error to charge the jury "to take into consideration the manner by which, and the purpose for which, the defendant had possession of the weapon with which he committed the homicide." Stewart v. State, 1 O. S. 66.

While one, who first makes a malicious assault upon another, continues in the conflict which ensues, he can not justify taking the life of his adversary, however necessary it may be to save his own, or to whatever extremity he may be reduced. Stoffer v. State, 15 O. S. 47.

When one, who first makes a malicious assault upon another, has succeeded in wholly withdrawing from the conflict, and, in good faith has retreated to a place of apparent security, his right of self-defense is fully restored, and if pursued by his antagonist and there attacked in a manner to endanger life, he is justified in taking life if it becomes inevitable to save his own. Stoffer v. State, 15 O. S. 47.

On the trial of an indictment for murder, the burden of proving that the homicide was excusable on the ground of self-defense rests on the defendant, and must be established by a preponderance of the evidence. Silvus v. State, 22 O. S. 90; Weaver v. State, 24 O. S. 584.

Homicide is justifiable on the ground of self-defense, where the slayer, in the careful and proper use of his faculties, *bona fide* believes, and has reasonable ground to believe, that he is in imminent danger of death or great bodily harm, and that his only means of escape from such danger will be by taking the life of his assailant, although in fact he is mistaken as to the existence or imminence of the danger. Marts v. State, 26 O. S. 162.

On the trial of an indictment for murder, the prisoner may, for the purpose of showing that the homicide was justifiable on the ground of self-defense, prove that the deceased was a person of violent, vicious and dangerous character, and that that character was known to the prisoner at the time of the *rencontre* between them. Marts v. State, 26 O. S. 162.

Evidence of the reputation of the deceased as being a vicious, violent or dangerous person, can only be given after the introduction of testimony tending to show that such was in fact his character, and then only for the purpose of proving that

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the prisoner had notice of that character. The dangerous character of the deceased can not be proved by proof of his reputation, but notice of that character to the prisoner may be shown by proof of such reputation, in connection with proof that the prisoner had the means of knowing that reputation. Marts v. State, 26 O. S. 162.

In a criminal prosecution, where the defendant seeks to justify, on the ground of self-defense, it is not competent to give in evidence the opinion of a witness as to the existence of danger to life, or of great bodily harm, or that such danger might have been reasonably apprehended by the defendant. State v. Rhoads, 29 O. S. 171.

Where a person, in the lawful pursuit of his business, and without blame, is violently assaulted by one who manifestly and maliciously intends and endeavors to kill him, the person so assaulted, without retreating, although it be in his power to do so without increasing his danger, may kill his assailant, if necessary to save his own life or prevent enormous bodily harm. Erwin v. State, 29 O. S. 186.

Where a wounding with a knife is sought to be justified on the ground of self-defense against a prior assault, and the circumstances do not show any reasonable apprehension of loss of life, or of great bodily harm, it is error for the court, after having charged the jury, that a person assaulted may use all the force necessary to repel the assault, to refuse to charge, in substance, that if the resistance were disproportionate to the assault, or excessive, the defendant would be liable. Close v. Cooper, 34 O. S. 98.

Homicide is not excusable on the ground of self-defense, although the slayer believes, in good faith, that he is in imminent danger of death, or great bodily harm, and that his only means of escape from such danger consists in taking the life of the assailant, unless there were reasonable grounds for such belief. Darling v. Williams, Adm'r, 35 O. S. 58.

Where evidence has been introduced tending to show that the act charged was committed by the accused at a time when he was being actually assaulted by the prosecuting witness with a dangerous weapon, it is competent for the defense to prove that the general reputation of the prosecuting witness was that of a violent and dangerous man, and that such general reputation was known to the accused at the time of the assault, as tending to support the plea of self-defense. Upthegrove v. State, 37 O. S. 662.

Where one is assaulted in his home, or the home itself is attacked, he may use such means as are necessary to repel the assailant from the house, or to prevent his forcible entry, or material injury to his home, even to the taking of life. But a homicide in such a case would not be justifiable unless the slayer, in the careful and proper use of his faculties, *bona fide* believes, and has reasonable ground to believe that the killing is necessary to repel the assailant or prevent his forcible entry. State v. Peacock, 40 O. S. 333.

On the trial of one charged with homicide, where the defense is that the killing was done in resisting an attack from a mob, the cries of the mob from the time it was formed, though made before the deceased joined it, are competent evidence to prove its spirit and purposes, and as reflecting upon its attitude at the time the alleged attack was made. Goins v. State, 46 O. S. 457.

Where one is on trial for homicide, and is defending on the ground that the killing was done in repelling the attack of a mob, he has a right to prove, and have the jury consider, the violent, malicious and criminal acts and declarations of the mob. Goins v. State, 46 O. S. 457.

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Where a number of persons, in the exercise of their lawful rights, have reason to apprehend an immediate, violent and criminal assault upon them as a party from superior numbers, it is not unlawful for them to combine for their just defense. Goins v. State, 46 O. S. 457.

When a defendant is indicted for shooting another, with intent to kill him, or to wound him, and the evidence submitted tends to show an unprovoked, felonious and dangerous assault by the prosecuting witness upon the defendant, immediately prior to the shooting, and that it was necessary for the defendant to fire the shot to save his life, or to prevent great bodily harm to himself, it is error for the court to charge the jury, "nor does the right of self-defense arise, if the person can reasonably rely for protection upon legal authority, or can reasonably get out of the way of danger," and to refuse to charge the jury, when requested to do so by defendant's counsel, that, "where a person, in the lawful pursuit of his business, and without blame, is violently assaulted by one who manifestly or maliciously intends or endeavors to kill him, the person so assaulted, without retreating, though in his power to do so, without increasing his danger may kill his assailant, if necessary, to save his own life, or prevent enormous bodily harm," if there be no equivalent language in the charge given. Venable v. State, 1 C. C. 301; 1 O. C. D. 165.

It was the claim of the defendant that just before the killing of deceased by him, the latter had put his hand to his pistol pocket, as if to draw a weapon therefrom, and that the defendant then shot him to protect his own life. He sought to prove by another witness that on several other occasions he had seen deceased do the same thing; but there was no offer to prove that the defendant had seen this, or that he had any knowledge of what had taken place at either of these times. Such evidence was not competent and was rightly excluded. Thurman v. State, 4 C. C. 141; 2 O. C. D. 466.

Under a plea of self-defense the defendant can not introduce evidence as to the manner in which the deceased treated men in his employ. Thurman v. State, 4 C. C. 141; 2 O. C. D. 466.

It being the law of this state, when by the evidence offered by the prosecution, it is shown that a defendant on trial for murder, killed the deceased, and no excuse therefore appears from such evidence, and the defendant seeks to justify his act by showing that it was done in self-defense while resisting a felonious attack made upon him by such person, the burden is upon him to show by a preponderance of the evidence all the facts necessary to excuse him; and that to entitle him to an acquittal he must make it appear that he did not commit the act in the exercise of a careless and negligent judgment, but rather under such circumstances as would show that he believed, and had reasonable ground to believe, that he was in danger of death or great bodily harm from his assailant, the court in such case properly refused to charge the jury as requested by counsel for the defendant, "that the burden was on the state to show that the defendant exercised a careless and negligent judgment as to the appearance of danger to himself, and that unless this was shown by the state, the defendant should be acquitted." Turner v. State, 5 C. C. 537; 3 O. C. D. 263.

Evidence was offered in the case tending to show that a few minutes before the homicide the deceased on the premises then controlled by the defendant had an affray with another person, which defendant had sought to stop, and which the deceased had resented, and in the presence of the defendant, had pursued such other person with a knife in his hand. The evidence also tended to prove that soon after

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this the deceased made a felonious attack on the defendant with a drawn knife, and was then shot by defendant. The state had offered evidence tending to disprove this, and to show that the deceased did not have any knife. The court refused to receive the evidence that the deceased had, in the presence of defendant, pursued the other person with a knife. The evidence was competent and should have been received. If not strictly a part of the *res gestae* (which it probably was), it was admissible to show that the deceased had a knife shortly before his death, and also as tending to show the character of the deceased as a vicious and dangerous man, and that the defendant knew this.

Even if these facts had been shown by another witness, the defendant was entitled to prove it by another witness. Turner v. State, 5 C. C. 538; 3 O. C. D. 263.

Where the defendant, charged with shooting another with intent to kill, sets up a justification on the ground of self-defense, it is error to charge:

(a) "That the person making the assault came at the other (the defendant), maliciously, and with every manifestation of endeavoring to kill the person assaulted, and that he was prepared, and manifested the fact that he was able to carry out this malicious assault. It is only under such circumstances that the person assaulted may use the force necessary, without retreating," to kill the assailant.

(b) That the jury must be "satisfied from a preponderance of the evidence," that the defendant "used no more force than was necessary to repel the assailant," or than "was reasonably necessary to save his life, or his person, from great bodily harm."

(c) Under the facts of this case it was error to instruct the jury to find whether there had been a conflict between the defendant and the prosecuting witness, "and if so, who was the aggressor or the first to make a malicious assault in the conflict;" and that they must be satisfied from a preponderance of the evidence that the prosecuting witness "first made a malicious assault upon the defendant, and that the defendant did the shooting while endeavoring to defend himself against that malicious assault," without defining to the jury what was meant by malicious assault. Jordan v. State, 13 C. C. 471; 7 O. C. D. 133.

In the general charge of the court to the jury on the law of self-defense in a case of this kind, the jury was instructed that, to justify the defendant in taking the life of his assailant, "it must appear that the defendant, at the time of firing the fatal shot, in good faith, and in the proper and careful exercise of his faculties, believed, and had reasonable ground for believing, that he was in imminent danger of death or great bodily harm from such assault." The mere belief alone of such danger is not sufficient to excuse a homicide. He must have arrived at such belief by the careful and reasonable use of his faculties; and, further, he must have had reasonable ground for believing the existence of such danger; *such grounds as would cause a man of ordinary courage so to believe. Held*, that the language of the said charge in italics, and similar language used in other special charges given by the court to the jury at the request of the counsel for the state, was erroneous and prejudicial to the rights of the defendant. Martin v. State, 17 C. C. 406; 9 O. C. D. 621.

It is error to charge without qualification that upon the requisite measure of proof by the state, of an unlawful killing by the defendant, the burden is thrust on him to show, by the greater weight of evidence, that it "was done, not of malice,

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but in the necessary defense of his person from death or enormous bodily harm;" inasmuch as the apparent effect of such an instruction is to preclude him from the right to take life to protect against the reasonably grounded apprehension of such consequences. Donald v. State, 21 C. C. 124; 11 O. C. D. 483.

When the person accused in an indictment for murder is defending on the ground of self-defense, he may prove that the deceased was a person of violent and dangerous character and that such character of the deceased was known to him at the time of the affray. State v. Roderick, 77 O. S. 301.

In general the mode of proving the violent and dangerous character of the deceased is by showing that such was the general reputation of the deceased in that community and at that time and that such reputation was known to the defendant; but the defendant can not be permitted to prove, for the purpose of showing reasonable ground for apprehension of bodily injury or loss of his life, particular instances of violence or viciousness on part of the deceased, which did not concern the defendant and at which the latter was not present and of which he has no personal knowledge. State v. Roderick, 77 O. S. 301.

Before a defendant in a homicide case can be required to establish self-defense by a preponderance of the evidence, the state must establish that the killing by him was an unlawful killing within the degree of the crime charged. Taylor v. State, 12 C. C. N. S. 486.

A charge to a jury in a prosecution for assault and battery in which self-defense is asserted is erroneous where it instructs the jury that the burden is on the defendant to show that he was in actual danger; that the exigency demanded self-defense, and that he used no more force than was actually necessary, ignoring any question as to a reasonable belief that he was in danger and that the force used was necessary to his defense. Aurand v. State, 12 C. C. N. S. 311.

In such a prosecution, where it is claimed that the defendant acted in self-defense and does not admit any intent to kill, a charge that "no other ground of justification or excuse than self-defense is claimed by the defendant, and no other will be considered by you," tends to exclude the right of the defendant to reduce the grade of the offense charged from murder in the second degree to manslaughter, and is prejudicial error. Munday v. State, 5 C. C. N. S. 656; 16 O. C. D. 712. Affirmed, 72 O. S. 614.

Homicide is justifiable on the ground of self-defense, where the slayer, in the careful and proper use of his faculties, *bona fide* believes, and has reasonable ground to believe, that he is in imminent danger of death, or great bodily harm, and that his only means of escape from such danger will be by taking the life of his assailant, although in fact he is mistaken as to the existence or imminence of the danger. Mortz v. State, 26 O. S. 162, followed; Wray v. State, 17 O. C. D. 1.

SUICIDE—

Where, on the trial of an indictment for murder, the prisoner, for the purpose of proving that the deceased came to her death by suicide, offered to show that six years previous to her death she was of a melancholy condition of mind, and predisposed to and threatened to commit suicide. *Held*, that it was error in the court to reject the testimony, the remoteness of the period to which it referred going merely to its weight, and not to the competency. Blackburn v. State, 23 O. S. 146.

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THREATS—

In a trial for murder in the second degree, the state may prove previous threats made by the defendant against the person he afterward killed, in order to show that the killing was malicious. Stewart v. State, 1 O. S. 66.

It is competent, on a trial for murder, to show threats made by the accused against the property of a person other than that of the murdered man, when such property is shown to have been then in the possession of the deceased, and shortly after the murder in the possession of the defendant. Mimms v. State, 16 O. S. 221.

Where, during an angry and violent altercation between the prisoner and the prosecuting witness, the former threatened to shoot the latter, and immediately thereafter procured a gun and discharged it at the latter, it is error for the court to charge the jury that, from this threat alone, they might infer that the gun was loaded. Fastbinder v. State, 42 O. S. 341.

If, after the commission of an offense, threats are made by the defendant against the prosecuting attorney of the county, evidence of such alleged threats is not admissible, unless it appears that they were made under such circumstances and are of such character as to manifest a consciousness of guilt. Gawn v. State, 13 C. C. 116; 7 O. C. D. 19.

VARIANCE—

The reference in § 3, of the pure drug statute (87 Ohio Laws, 248), to the United States Pharmacopœia, is to the edition in general use when the statute was enacted, which was that of 1880.

The sale of a drug which was equal to the standard of strength, quality and purity laid down in that edition, is not rendered unlawful because it is below a higher standard laid down in a subsequently revised edition, though the latter edition was in general use when the sale was made.

A copy of the subsequent revised edition is not competent evidence on the trial of a prosecution under the statute. State v. Emery, 55 O. S. 364.

On the trial of an indictment under § 6816, Revised Statutes (G. C., § 12414), for carnally knowing and abusing a female person under the age of sixteen years, with her consent, the evidence having established the carnal knowledge and the alleged ages of the parties, evidence tending to show that the act was committed without consent does not constitute a fatal variance. State v. Carl, 71 O. S. 259.

On the trial of an indictment charging the defendant with the crime of burglary, a variance between an allegation of said indictment and the evidence offered in support of it, in the name or description of the building alleged to have been broken and entered, is not ground for an acquittal of the defendant, unless such variance is material to the merits of the case, or prejudicial to the defendant. Section 7216, Revised Statutes (G. C., § 13582). State v. Turnbaugh, 79 O. S. 63.

Where the allegation in an indictment is, that the accused maliciously and forcibly broke and entered the store-house of B, and the evidence offered in support of such allegation establishes the fact that he thus broke and entered a certain room, the property of B, built for and by him occupied and used exclusively as a store-house; which room adjoined another compartment or room in the same building, occupied by B and family as a living room, the two compartments, however, being separated by a permanent partition and the only means of communication between them being through a door in said partition, which was kept locked at night, and which on the night of the burglary was shown to have been securely

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locked and fastened, the variance, if any, between the averment of said indictment and the proof, is not sufficient ground for an acquittal of the defendant. State v. Turnbaugh, 79 O. S. 63.

The admitted sale of milk which was below standard, from a wagon belonging to the defendant and from cans which contained the supply he had delivered to his customers, does not justify his conviction of selling milk below standard, where the evidence fails entirely to show that the boy who made the sale was authorized to sell milk, or had ever sold any before, but that he sold the milk on this occasion without the knowledge of the owner, while temporarily in charge of the wagon, and did not account to the owner for the money received therefor. Diersing v. State, 9 C. C. N. S. 214; 19 O. C. D. 469.

In order to warrant a conviction for violation of an ordinance providing for the licensing of ball grounds, etc., there must be evidence that the accused was engaged in the business as keeper, proprietor or manager, and this requirement is not met where the evidence goes no further than to indicate that the accused maintained a ball ground and pavilion on his private grounds, but not for profit and with which the public had nothing to do. Silverton v. Davis, 10 C. C. N. S. 60; 20 O. C. D. 523.

The time laid for the receiving of the money in an indictment for embezzlement is immaterial, when it appears that at the time the embezzlement occurred the ownership of the property was as alleged in the indictment. Tidd v. State, 11 C. C. N. S. 271; 20 O. C. D. 679.

Where the indictment charges embezzlement as agent, but the proof is to the effect that the defendant was employed by the prosecuting witness as her attorney, and in that capacity received the money which he fraudulently converted to his own use, it is error to overrule a motion for an instructed verdict finding the defendant not guilty on the ground of variance. Orebaugh v. State, 11 C. C. N. S. 603.

Where, upon the trial of a person over eighteen years of age charged with rape upon the person of a female under the age of sixteen years, the indictment, in the first count, charges the offense to have been committed with the consent of the female, and in a second count, forcibly and against her will, it is not error for the court to overrule a motion by defendant made at the conclusion of the state's evidence in chief to require the state to elect upon which count of the indictment it will rely for a conviction. State v. Hensley, 75 O. S. 255.

In such case it is error for the court to charge the jury that they may find a general verdict of guilty upon both counts of the indictment if they should find the evidence to be of such character as to warrant a conviction upon either count. State v. Hensley, 75 O. S. 255.

To convict a party of forging an indorsement on a check otherwise genuine, the indictment must charge the particular act complained of, namely, of forging an indorsement of the instrument; and where the indictment charges only an unlawful uttering and publishing of the instrument, there is a failure of proof where only a false and forged indorsement is shown. Cosner v. State, 1 C. C. N. S. 197; 14 O. C. D. 734. Affirmed, 48 W. L. B. 487.

WITNESS—

Where, in a criminal case, the court, at the request of the accused, made an order for the separation of the witnesses, so that they should not hear the testimony of each other as delivered, and one of the witnesses remained in court during the

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examination of the others, in disobedience of the order, and the court, notwithstanding, permitted him to testify, it was held that the matter was discretionary with the court, and not subject to review on error. Laughlin v. State, 18 O. 99.

The clause of § 10 of the bill of rights, providing that, "on any trial in any court, the party accused shall be allowed to meet the witnesses face to face," which, like numerous other provisions in the bill of rights, is a constitutional guaranty of a fundamental principle, well established and long recognized at common law, has reference to the personal presence of the witnesses called to testify, and not to the quality or competency of the evidence to be given. Summons v. State, 5 O. S. 325.

Testimony proving the statements made by a deceased witness on oath, at a former trial between the same parties, being one of the established exceptions to the rule that hearsay is incompetent as evidence, the admittance of a witness to give evidence of this kind in a criminal case does not contravene the aforesaid provision of the constitution. Summons v. State, 5 O. S. 325.

It is not essential to the competency of such evidence that it be given in the exact words used by the deceased person; but while the witness is allowed to give the substance of the statements of the deceased person on the former trial, he is not allowed the latitude of giving their mere effect. Summons v. State, 5 O. S. 325.

It is essential to the competency of the witness called to give this kind of evidence, first, that he heard the deceased person testify on the former trial; and, second, that he has such accurate recollection, of the matter stated, that he will, on his oath, assume or undertake to narrate in substance the matter sworn to by the deceased person, in all its material parts, or that part thereof which he may be called on to prove. Summons v. State, 5 O. S. 325.

It is essential to the competency of the evidence, first, that the matter stated at the former trial, by the witness since deceased, should have been given on oath; second, between the same parties, and touching the same subject-matter, where opportunity for cross-examination was given to the person against whom it is now offered; and, third, that the matter sworn to by the person since deceased be stated in all its material parts, and in the order in which it was given, so far as necessary to a correct understanding of it. Summons v. State, 5 O. S. 325.

The requirement that all the matters sworn to on the former trial by the person (since deceased) be stated, being one of the tests of the competency of the evidence, but not of the competency of the witness, it is not essential that it be all proven by a single witness. Summons v. State, 5 O. S. 325.

By giving the substance of all the testimony is meant all that is material, for all matters not material are not evidence. It was incumbent on plaintiff in error to state in his bill of exceptions enough of the case to show the materiality of the subject-matter of his complaint (that witness had not stated all the testimony of the deceased witness), before he could entitle himself to a reversal of the judgment. Summons v. State, 5 O. S. 325.

When the matter sworn to on a former trial, by a person since deceased, has been proven on the part of the state, in a criminal case, by a witness who assumed to state the substance of all the statements to which the deceased person had deposed, and evidence is afterward given in the defense, proving certain matters in the statements of the deceased witness, which were omitted in the evidence on the part of the state, the jury are not, for that reason, required to reject the evidence, on the part of the state, offered to prove what the deceased witness

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had testified, provided, that taking this evidence on the part of the state, in connection with the other evidence in the case, they are satisfied they have before them the substance of all the evidence given by the deceased witness on the former trial. Summons v. State, 5 O. S. 325.

It is error to charge that if the general character of a witness for truth is successfully impeached, you are bound to disregard the whole of his testimony. Sharp v. State, 16 O. S. 218.

The fact that an accomplice has committed perjury, on a former examination touching the same subject-matter, even when he admits the fact upon his present examination, but where he has not been legally convicted of the perjury, only affects his credit, and does not render him incompetent, or necessarily render his testimony incredible. Brown v. State, 18 O. S. 496.

The limits to which a witness may be cross-examined on questions not relevant to the issue, for the purpose of judging of his character and credit from his own voluntary admissions, rest in the sound discretion of the court trying the case. Such questions may be allowed when there is reason to believe that it will tend to the ends of justice; but they ought to be excluded, when a disparaging course of examinations seems unjust to the witness, and uncalled for by the circumstances of the case. Wroe v. State, 20 O. S. 460; Hanoff v. State, 37 O. S. 178.

In a criminal, as in a civil case, an application for the postponement of the trial to a subsequent term is addressed to the discretion of the court. And in a criminal case where such motion is made on behalf of the accused to enable him to procure the attendance, or, under § 7293 of the criminal code, the deposition of a witness who resides out of the state, and whose testimony he has not been able to obtain, it is not error for the court to require the applicant to set out in his affidavit filed in support of the motion the facts he expects to prove by such wtiness; or to refuse to grant the motion in case the prosecution elects to admit upon the trial that the witness named would so testify, and to treat the statement of facts so set out as his deposition. Comerford v. State, 20 O. S. 599.

Where an accomplice testifies as a witness, a liberal and full cross-examination, for the purpose of testing the truth of his statements, should be permitted, and it is error to restrict such cross-examination within unreasonable limits. Where an accomplice testified in chief that, in Gallia county, about a week before the 16th of November, he saw a letter from the accused, which was a material fact on the part of the prosecution, it was error in the court not to allow the accused to show upon cross-examination that the witness was absent from that county from the 5th to the 12th of the same month. Lee v. State, 21 O. S. 151.

Where a witness truly made the entries in a freight-book of a railroad company, on the day the entries purport to be made, in the regular course of business, including an entry of a particular shipment in question, the freight-book is admissible in evidence, with the oath of the witness showing these facts, although at the time of testifying he has no recollection of the particular shipment, or of anything of the date of its entry, and although his memory is not refreshed by the book, and he knows nothing of the matter, except as he sees it in the book. Moots v. State, 21 O. S. 653.

Where, in the trans-shipment of goods from one car to another, "check-slips" are made in the regular course of business, showing the number of the cars and the descriptive marks of the goods, such "check-slips" are admissible in evidence, with the testimony of the witness, showing that they were truly made by him, and that

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the goods were marked and shipped as thereby indicated, the witness then having no other recollection of the transaction in question. Shriedley v. State, 23 O. S. 130.

The mere fact that leading questions are improperly allowed on the examination of a witness, although allowed as of right, is not error for which the judgment will be reversed. The allowing or refusing of leading questions in the examination of a witness must very largely be subject to the control of the court, in the exercise of a sound discretion. Evans v. State, 24 O. S. 458.

The credibility of a witness can not be affected by showing his former conviction of an offense under a city ordinance against disorderly conduct. A conviction which may be shown to affect the credibility of a witness, under § 7284 of the criminal code, is such only as, independent of the section, would have rendered the convict incompetent to testify. Coble v. State, 31 O. S. 100.

The question: "How many times have you been arrested?" is admissible on cross-examination, but an answer thereto can not be enforced, and if it be voluntarily given, the party asking the question is bound by the answer. Coble v. State, 31 O. S. 100.

To the general rule that husband and wife are not competent witnesses for or against each other in a criminal prosecution, an exception prevails where either the husband or wife is on trial for a personal injury inflicted on the other; in such case the party injured is a competent witness against the other. Whipp v. State, 34 O. S. 91.

Where a woman with whom the defendant was living as his wife at the time of the commission of the crime, is shown to have been previously married to another man who was still living and from whom she had not been divorced, it is competent for the state to call her as a witness against the defendant. Lynch v. State, 23 C. C. (N.S.) 230.

The wife is a competent witness to testify to the non-access of her recreant husband, in a criminal case against the putative father of her illegitimate child, for failure to provide said child under sixteen years of age, with necessary and proper food, clothing and shelter, under the provisions of G. C. § 12970. The father could have been prosecuted under either G. C. § 12970 or G. C. § 13008, but prosecution under the latter section could not be filed in the municipal court. State v. Bone, 25 C. C. (N.S.) 447 (motion for leave refused, 14 O. L. R. 160).

Where, on a trial for murder, the question was whether poison was administered to the deceased through the negligence of a physician or intentionally by the accused, and the state in rebuttal gave in evidence the testimony of a druggist with whom the physician was accustomed to deal, to the effect that the physician was skillful and careful in the use of medicines, the accused has the right to cross-examine the witness as to the extent and character of the dealings from which his opinion is formed. Dresback v. State, 38 O. S. 368.

While the court is vested with discretion to refuse or permit the examination of a witness who has remained in court, by procurement or connivance of the party calling him, in violation of an order for the separation of witnesses, it is vested with no such discretion to prevent such examination where there has been no such procurement or connivance; but the order is to be enforced by the officers in attendance, and disobedience of it punished by the court as for contempt. Dickson v. State, 39 O. S. 73.

Where a witness has been cross-examined as to matters which are merely collateral and immaterial to the issue, and such as have no tendency to show bias or interest in favor of or against a party, his answer is, in general, conclusive upon the party making the inquiry; but where the cross-examination is with respect to matters involved in the subject under consideration, or is with the view of showing the feeling, bias or interest of the witness with respect to the parties or either of them, the party cross-examining may, in a proper case, call witnesses to contradict the testimony so elicited on cross-examination. Kent v. State, 42 O. S. 426.

While it is a rule that a judgment will not be reversed for the exclusion of evidence, unless every material part of it is competent for the purpose stated by the party offering the same, it is equally well settled that where evidence is admitted against a general objection, the judgment will not be reversed on the ground that the evidence was incompetent, unless no material part of such evidence was admissible

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K was convicted of arson. On his trial evidence was offered tending to show that G induced him to commit the offense to obtain on policies of insurance upon the property, though proof of such conspiracy was not essential to K's conviction. K offered G as a witness, who denied such conspiracy, and gave evidence in other respects tending to K's acquittal. On cross-examination of G, to which K excepted, G denied that he had stated that "K was costing him too much, because he, K, had burned his, G's, store-house." *Held*, that the state might call witnesses to prove that G so stated; and the objection being general, the fact that the matter elicited by such cross-examination and contradiction may not have been in all its parts competent will afford no ground for reversing the judgment. Kent v. State, 42 O. S. 426.

Where one of several defendants jointly indicted for a felony is tried separately, and the prosecuting witness testifies in chief that the offense was committed by several persons acting together, and testifies to the identity of the defendant on trial, it is proper in cross-examination, for the defense to inquire as to the identity of the other participants, and it is error for the court to refuse to permit such cross-examination. Morgan v. State, 48 O. S. 371.

A witness can not state, as the reason why former testimony was impressed upon his memory, his conjectural conclusion therefrom as to the intention of the prosecuting attorney in conducting the examination. Breck *et al* v. State, 4 C. C. 100; 2 O. C D. 477.

Within discretion, questions may be excluded by the court as being in form too argumentative. State v. Leuth, 5 C. C. 94; 3 O. C. D. 48.

Where, upon the trial of a person accused of forging an instrument purporting to be a last will, a witness for the state testified that shortly before the date of the instrument in question, in a conversation with the alleged testatrix, he read to her a portion of a letter written to him by a third person, having reference to a proposed testamentary disposition of her property, the defendant is not entitled, upon cross-examination, to have read to the jury a certain other portion of the same letter, unless he consent that the entire letter may be read. Corbett v. State, 5 C. C. 156; 3 O. C. D. 79.

A witness for the state testified to a criminating statement alleged to have been made by the defendant immediately after the homicide, the making of which was denied by the defendant and other witnesses present at the time the statement was said to have been made. On cross-examination, such witness testified that he had been examined as to these matters at the inquest held by the coroner immediately afterward, and was further asked if he had then testified that defendant had used any such language. The court refused to allow the question to be answered. *Held*, that such refusal was erroneous. Turner v. State, 5 C. C. 538; 3 O. C. D. 263.

The order in which testimony as to some fact goes to the jury does not affect its competency, if it finally all gets to the jury. Moran v. State, 11 C. C. 464; 5 O. C. D. 234.

Where counsel for the accused, on cross-examining the officer who made the arrest, attempted to show that he acted recklessly and without any reliable information and in bad faith, it is competent, on re-examination, to let him state that before starting out to make the arrest the wife of the deceased gave him a description of the man who made the assault, and to state what that description was. Moran v. State, 11 C. C. 465; 5 O. C. D. 234.

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Where the testimony of a deceased person or a party in a former trial is sought to be reproduced by the evidence of one who heard it, but only as to a particular portion, it is a sufficient qualification to testify to this, that the witness can recollect and state the substance of the part offered. Donald v. State, 21 C. C. 124, 11 O. C. D. 483.

In the trial of a criminal case, evidence of the testimony delivered in a previous trial of the same case by a witness not dead, but beyond the jurisdiction of the court, or limits of the state, is not admissible unless it appear to the satisfaction of the trial court that the witness is absent through the connivance, or by the procurement of the accused. State v. Wing, 66 O. S. 407.

A court has inherent power to administer oaths on the trial of cases, without an express provision therefor by statute.

An indictment for perjury which charges that the oath was administered in open court by a deputy clerk should be sustained when the evidence shows that the oath was administered in open court by one who was performing the duties of a deputy clerk. State v. Townley, 67 O. S. 21.

A wife is not a competent witness to testify on behalf of the state and against her husband on the trial of the latter upon an indictment charging him with unlawfully neglecting and refusing to provide for his minor children as provided in § 3140-2, Revised Statutes. (See 99 O. L. 230.) State v. Orth, 79 O. S. 130.

It is not the province of the court to classify witnesses, and give to the jury what the experience of the courts may be in respect to such a class, but their credibility should be left to the jury, under all the competent facts and circumstances of the case before it. State v. Tuttle, 67 O. S. 440.

It is only such a conviction as under the old law would have rendered a witness incompetent that can be introduced under the law as it is today to discredit him; and where, for the purpose of discrediting a witness, a record is offered of conviction of an offense which is not made a crime or misdemeanor under any statute of the state, and was in violation of a city ordinance only, it is not error to sustain an objection to its admission in evidence. August v. Finnery, 10 C. C. (N.S.) 433, 20 O. C. D. 330.

When a witness refuses to answer a question propounded to him on the ground that his answer will tend to criminate him, his claim of privilege is properly allowed by the court if, from the circumstances of the particular case and the nature of the question asked, it appears there is reasonable ground to apprehend that his answer would have the effect claimed by him. State v. Murray, 82 O. S. 305.

Where the question put to a witness is competent, or not objected to by counsel, and the witness answers, a part of which answer is competent and a part incompetent, a general objection to the whole answer is properly overruled, even though there be some objectionable matter in the answer. To save the objector's rights he should clearly indicate the part of the answer to which he objects and move its exclusion. If the court overrules such motion, he should then save his exception. State v. Lasecki, 90 O. S. 10.

When the ground has been properly laid for impeaching a witness, it is not error to permit a stenographer who took his testimony before the grand jury to state that certain questions were there asked the witness and answers given by him and the stenographer may refresh his memory from his written notes of such testimony. John v. State, 16 C. C. (N.S.) 316.

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Where evidence of other offenses of a similar character is competent to prove intent, and the accused has not theretofore been convicted of such offenses, the burden is upon the state to prove that the accused is guilty of such other offenses by the same degree of proof required in all criminal cases. Where evidence of former offenses is properly admitted to prove intent, it is the duty of the trial court, at the time such evidence is offered, to instruct the jury the purpose for which it is admitted. Baxter v. State, 91 O. S. 167.

Where, in an arson case, the cause or origin of the fire is the subject of inquiry, it is prejudicial error to permit witnesses to state the conclusions they have reached from things they have seen and the facts they have related, but the witnesses having related the facts, the jury should be left to draw their own conclusions. Carter v. State, 4 O. A. R. 193, 22 C. C. (N.S.) 154.

In a prosecution for forgery, in which a denial has been entered, the defendant is entitled to have the alleged forged instrument produced or its non-production accounted for before secondary evidence as to its contents is admissible, and a mere statement by the prosecuting attorney to the effect that he did not have nor had he seen the instrument to which the indictment refers, either before or since the sitting of the grand jury which returned the indictment, is not a sufficient explanation of the reason for its non-production at the trial. Cochran v. State, 25 C. C. (N.S.) 430.

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